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## CIVIL PROCEDURE REPORTS.

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RUTHERFORD *v.* KRAUSE, *et al.*

SUPREME COURT, DELAWARE COUNTY, SPECIAL TERM,  
APRIL, 1894.

§ 523.

*Pleading—verification of answer when may be omitted.\**

Where any part of a pleading relates to matters concerning which a party would be privileged from testifying he is not required to verify it, although it could not be used in a criminal prosecution against him,—the criterion being whether the party if called as a witness would be excused from answering.

In an action to recover damages for negligence where the complaint alleges that the defendant wrongfully and immoderately drove a team of horses upon a public highway while he was intoxicated or drunk, and that the horses as a result thereof were injured, two criminal offences are charged, viz.: (1) cruelty to animals and (2) intoxication in a public place, both misdemeanors, and the defendant therefore, is excused from verifying his answer thereto.

Where a complaint shows upon its face that a crime is charged, the defendant need not verify his answer thereto, nor is it necessary that an affidavit accompany the answer showing the reason for omitting the verification.

(Decided April 23, 1894.)

Motion by the defendant Krause that a judgment entered against him by default be set aside as improperly taken.

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\* In 8 Civ. Pro. at page 438, *et seq.*, there is a "Note on verification of pleadings in civil actions," in which (at page 441) the right to omit the verification where the party pleading would be privileged from testifying as to matters contained therein is briefly considered.

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Rutherford v. Krause

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The opinion states the material facts.

*W. & G. Youmans*, for defendant Krause and motion

*Robert T. Johnson*, for plaintiff, opposed.

FORBES, J.—The complaint is based upon a cause of action for negligence for wrongfully and immoderately driving a team of horses upon the public highway, while it is claimed, the defendant was intoxicated, or drunk. It is also claimed that the horses were injured by such driving, and that the vehicle used was broken and destroyed. The complaint is verified, and was served on the 21st day of June, 1893.

An answer, in behalf of this defendant, was interposed and served, without verification, about the 1st day of July, 1893. This answer was returned because it was not verified, and a judgment was entered, as upon a default.

A motion is now made to set aside the judgment upon the ground that the judgment was unauthorized, that the cause is at issue, and that plaintiff's proceedings are irregular.

The single proposition presented is this: Does the complaint, upon its face, state facts sufficient to authorize the omission of the verification of the answer, by the defendant answering?

A careful review of the authorities, I think, is sufficient to show that if all of the facts alleged in the complaint are to be taken as true, and an answer admitting those facts was served, that answer could be used against this defendant as an admission, on his part, of the commission of a crime.

He is charged with being intoxicated in a public place. This is a crime, both by statute and by the

decisions of the courts. *Laws of 1892, Chap. 401, § 35*, which read as follows: "Any person who shall be intoxicated in a public place shall be guilty of disorderly conduct, may be arrested without warrant while so intoxicated, and shall be punished by a fine of not less than three, or more than ten dollars, or by imprisonment not exceeding six months." *Hill v. People*, 20 N. Y. 363.

He is also charged with immoderate driving, which must be construed as overdriving, and upon the facts of intoxication and immoderate driving is based the cause of action alleged in the complaint. Overdriving is made a misdemeanor by section 655 of the Penal Code. This is defined, by section 669 of the Penal Code, as torture or cruelty to an animal (not a human being), which includes—"Every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted."

These facts appear upon the face of the complaint, and the punishment is provided for under the Code of Criminal Procedure, section 56, subd. 27.

I think the real test is whether any part of the pleading would excuse a party testifying, or,—if there is more than one party, anyone would be privileged,—verification may be omitted. The criterion is whether, if called as a witness, the party would be excused from answering. (*Goth v. Star Printing Co.*, 14 *Civ. Pro.* 3.)

Assuming this as a test, then, were the defendant called as a witness by the plaintiff, could he decline to answer upon the ground that his evidence would tend to convict him of a crime? Can there be any serious doubt about it, inasmuch as the complaint, in two particulars, charges him with a misdemeanor? (*Friess v. N. Y. Central and Hudson River R. R. Co.*, 67 *Hun.* 205.)

The fact of voluntary intoxication can be used in aggravation of damages. Immoderate driving, thus making the offense of cruelty to animals, can also be used in

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Rutherford v. Krause.

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aggravation of damages, and must be presumed to have been charged in the complaint for that purpose. When a person does a wrongful act, which results in a particular injury to another, the latter has a remedy by action. (Thomas v. Smith, 75 Hun. 573).

The omission to verify is permitted by the Code (*Code Civ. Pro.* § 623): "Where a party pleading would be privileged from testifying, as a witness, concerning an allegation, . . . in the pleading." \*

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\* NOTE ON RIGHT TO OMIT VERIFICATION OF PLEADING.

I. As to when verification may be omitted, (see "*Note on verification of pleadings in Civil Actions*" 8 *Civ. Pro.* 438 at p. 441); also, in action for libel (*Wilson v. Bennett*, 2 *Civ. Pro.* 34); in action against corporation for libel, (*Goth. v. Star Printing Co.*, 14 *Id.* 3); in action for obtaining goods by false pretenses, (*Frist v. Climm* 6 *Id.* 30; but see, *contra*, *Beckley v. Chamberlain* 22 *Civ. Pro.* 338); in action to recover debt of corporation from trustee because of failure to file annual report (*Gadsden v. Woodward* 11 *Civ. Pro.* 215, S. C., 103 N. Y. 242, *reversing* 38 Hun. 548, S. C. 3 *How. Pr. N. S.* 109); where the pleading might aid in forming a chain of testimony to convict of a criminal offense (*Clapper v. Fitzpatrick*, 3 *How. Pr.* 314; S. C. 1 *Code R.* 69); where the party would be excused from testifying to any matters alleged or denied in the pleading (*Blaisdell v. Raymond* 5 *Abb. Pr.* 144; *Wheeler v. Dixon*, 14 *How. Pr.* 151); answer in action for divorce (*Code Civ. Pro.* § 1757; *Anable v. Anable* 24 *How. Pr.* 92; *Sweet v. Sweet*, 15 *Id.* 169); answer where complaint charges defendant with keeping a bawdy-house (*Anderson v. Doty*, 33 Hun. 238).

II. As to when verification may not be omitted, see, in action for false arrest, not alleged to have been wilful (*Dehn v. Mandeville* 68 Hun. 335, S. C. 53 *St. Rep.* 281; 22 N. Y. *Supp.* 984); in action to recover price of goods sold through false representations (*Beckley v. Chamberlain* 22 *Civ. Pro.* 338); overruling (*Frist v. Climm*, 6 *Civ. Pro.* 30); in action against trustee of social corporation to recover on a corporate debt, (*Rogers v. Decker* 131 N. Y. 490); affirming 62 Hun. 15; in action to set aside fraudulent assignment, (*Walcott v. Winston* 8 *Abb. Pr.* 422); in action to recover money lost at play, where it does not appear that the matters alleged or denied tend to implicate the party as a winner (*Lynch v. Todd*, 13 *How. Pr.* 546).

III. Under *Code of Pro.* § 157 and *Laws of 1854* chap. 75 § 1, it was held that the verification of an answer could not be omitted

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Rutherford v. Krause.

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And this privilege may be claimed because it is given by the Code, notwithstanding the pleading cannot be used in a criminal prosecution against the party. He is not obliged to spread an admission of his crime upon the record. He need neither admit nor deny the criminality of the act, but may remain silent (*Friess v. N. Y. Central*

where the defense pleaded was that the loan sued for was made in a transaction in violation of the lottery laws, because the privilege was confined to answering allegations (*Fredericks v. Taylor*, 52 N. Y. 596; 8. C. 14 Abb. N. C. 77). The right to omit to verify a pleading is evidently not so limited under the Code of Civil Procedure which provides that "the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying as a witness, concerning an allegation or denial contained in the pleading" (*Code Civ. Pro.* § 523), and that "A defendant is not excused from verifying his answer to a complaint, charging him with having confessed or suffered a judgment, or executed a conveyance, assignment, or other instrument, or transferred or delivered money, or personal property, with intent to hinder, delay, or defraud his creditors; or with being a party or privy to such a transaction by another person, with like intent towards the creditors of that person, or with any fraud whatever, affecting a right or the property of another." (*Code Civ. Pro.* § 529).

The provisions of the Code of Procedure were not so broad as the provision from the Code of Civil Procedure § 523, above quoted. It provided that "the verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony." *Laws of 1854* chap. 75, § 1 provided that "the verification of any pleading in any court of record of this state may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading.

IV. Broadly stated an affidavit excusing the failure to verify by showing that the case is within the statute is necessary wherever it does not clearly appear from the pleadings that the party would be privileged from testifying as a witness (*Roache v. Kivlin*, 25 Hun. 10; *Dehn v. Mandeville* 68 Hun 335, 8. C. 52 St. Rep. 281; 22 N. Y. Supp. 984; *Lynch v. Todd* 13 How. Pr. 546), but not where the nature of the action, defense or allegations show the privilege. (*Goth v. Star Printing Co.*, 14 Cir. Pro. 3; *Maloney v. Dows*, 2 Hill, 247 affirming 15 How. Pr. 261; *Wheeler v. Dixon*, 14 How. Pr. 151; *Clapper v. Fitzpatrick* 3 Id 313; *Anderson v. Doty*, 33 Hun. 238; *Blaisdell v. Raymond*, 5 Abb. Pr. 144).

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Ten Eyck v. Town of Warwick.

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and Hudson River R. R. Co., *supra.*), and where the complaint shows upon its face the crime charged, no affidavit need accompany the answer (*Goth v. Star Printing Co., supra*, and cases there cited. *Dehn v. Mandeville*, 68 *Hun*, 335).

The judgment against this defendant must therefore be vacated and cancelled of record, and the answer must be deemed to have been served in time; but without costs to either party.

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## TEN EYCK v. TOWN OF WARWICK.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY,  
SPECIAL TERM, AUGUST, 1894.

## § 779.

*Stay of proceedings for non-payment of motion costs.*

The fact that the proceedings of the plaintiff in an action are stayed because of the non-payment of motion costs, will not prevent the making by him, and the granting of a motion for leave to enter final judgment dismissing the complaint which judgment the defendant declines to enter although entitled so to do.

(Decided August 3, 1894.)

Motion by the plaintiff for leave to enter final judgment dismissing the complaint, which judgment the plaintiff is entitled to, but refuses to enter.

This action was brought by the plaintiff, the owner and occupant of certain premises upon which there is a hotel situate upon the northernly end of Greenwood Lake, in the County of Orange, N. Y., to enjoin the defendants from interfering with navigation upon said lake, and to enjoin the defendant the Town of Warwick from preventing

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Ten Eyck v. Town of Warwick

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the closing and opening and ceasing to operate a draw-bridge erected over an arm of said lake. The defendant, the Town of Warwick, demurred to the complaint and the demurrer was sustained at special term and the interlocutory judgment thereupon entered was upon an appeal taken by the plaintiff affirmed by the general term in May, 1894 (See 78 *Hun.* 609.), with leave to plaintiff to amend his complaint on payment of costs. The plaintiff did not amend within the time given by the interlocutory judgment entered upon the decision of the general term and the plaintiff thereupon made this motion.

An injunction restraining the defendants from preventing the opening and closing of said bridge, and requiring the Town of Warwick to open and close it, was granted at the commencement of the action which was continued by order of the special term during the pendency of the action. This order was upon appeal taken by the defendants reversed by the general term (see *Ten Eyck v. Town of Warwick*, 75 *Hun.* 562; S. C. 27 *N. Y. Supp.* 536; 59 *St. Rep.* 636) and the order reversed with \$10 costs and disbursements and the motion to continue the injunction denied with \$10 costs. These costs had not been paid at the time of making this motion although more than ten days had elapsed since the service of a copy of the order granting them, with notice of its entry, and their non-payment was urged as a reason why this motion should be denied.\*

*Clarence C. Ferris*, for plaintiff and motion.

*Henry Bacon (Bacon & Merritt, Attorneys)*, for defendant, Town of Warwick, opposed.

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\*After the vacation of the injunction a reference was had to determine the damage done thereby, and an order made at special term assessing the defendant's damages. An appeal was taken from such order, and the decision therein is reported *sub nom.* (*Ten Eyck v. Sayera*, 76 *Hun.* 37; S. C., 27 *N. Y. Supp.* 588; 59 *N. Y. St. Rep.* 627).

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Ten Eyck v. Town of Warwick.

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BARTLETT, J.—This is an application on behalf of the plaintiff, for leave to enter final judgment dismissing the complaint, which judgment the defendant, the Town of Warwick, is entitled to enter but declines to enter.

The application is opposed on the ground that the plaintiff is in default for the non-payment of costs heretofore awarded against him in the action; the defendant relying upon section 779 of the Code, which provides that, where costs are not paid within the time fixed for that purpose, all proceedings on the part of the party required to pay the same, except to review or vacate the order are stayed without further direction of the Court until the payment thereof.

I think it would be a forced construction of this section to hold that it operates to prevent a litigant from taking steps to compel his adversary to place upon the record of the Court in an effective manner a judgment in favor of that adversary and against the applicant.

The section could never have been intended to prevent a party from insisting upon the entry of a judgment against himself.

It may very well be that, often the entry of such a judgment in favor of the Town of Warwick in the present action, section 779 will have the effect of staying all proceedings on the part of the plaintiff to review that judgment until the motion costs heretofore awarded to the defendant shall be paid, but that will be a matter for future consideration.

The plaintiff may have leave to enter final judgment herein, in accordance with the directions of the interlocutory judgment, unless such judgment is entered by the defendant within ten days' after service of notice of the entry of the order to be made upon this motion.



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Non-Payment of Interlocutory Cost.

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NOTE ON STAY OF PROCEEDINGS FOR NON-PAYMENT OF  
INTERLOCUTORY COST.

**The Statute.**—Provision was made by Laws of 1847, chap. 390, § 3, (3 R. S., 5 ed., 126; 4 Edm. Stat. 630), for “process in the nature of a *feri facias* against personal property . . . for the collection” of interlocutory costs “founded on” an order of the Court, and the same remedy was continued by the “Code of Remedial Justice,” taking effect in May, 1876, and by the same Code re-named, the “Code of Civil Procedure” when it after revision, took effect September 1, 1876,—the process, however, which had formerly generally been known as a “precept” being called in these Codes an execution against personal property.

But, the first statute enacted in this State providing for a stay of the proceedings in an action for non-payment of motion or other interlocutory costs is Laws of 1876 chap. 431, § 12, amending section 315 of the Code of Procedure. This provision was by the amendatory act of 1877, (Laws of 1877, chap. 416), incorporated in section 779 of the Code of Civil Procedure. The section was amended by chap. 542 of the Laws of 1877 by inserting the words “except to review or vacate the order” and by Laws of 1884, chap. 181 by inserting in the first part of the section, the words, “or any other sum of money.” It was also amended with respect to the issuance of execution and punishment for contempt by Laws of 1882, chap. 397 and Laws of 1884 chap. 181).

The provision of the Code of Civil Procedure now reads as follows: “§ 779. Where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or, if no time is so fixed, within ten days after the service of a copy of the order, an execution against the personal property only of the party required to pay the same may be issued, by any party or person to whom the said costs or sum of money is made payable by said order, or in case permission of the Court shall be first obtained, by any party or person having an interest in compelling the payment thereof, which execution shall be in the same form, as nearly as may be, as an execution upon a judgment, omitting the recitals and directions relating to real property, and all proceedings on the part of the party required to pay the same, except to review or vacate the order, are stayed without further direction of the Court until the payment thereof. But the adverse party may, at his election, waive the stay of proceedings. Where the order directs that the costs of a motion abide the event of the action, or where costs of a motion, awarded by an order, have not been collected, when final judgment is entered, they may be taxed, as part of the costs of the action, or set off against costs awarded to the adverse party, as the case requires. But nothing

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Note on Stay of Proceedings

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herein contained shall be so construed as to relieve a party or person from punishment as for contempt of court, for disobedience to an order, in any case when the remedy of enforcement by such proceedings now exists."

The history of the statutory provisions so far as they relate to the collection of costs by precept and execution is briefly reviewed in *Valiente v. Bryan* 3 *Civ. Pro.* 358.

**Decisions prior to the Statute.**—In *Pinney v. Johnson* (2 *Wend.* 623), MARCY J., says "the Court restrains parties from the prosecution of a second suit for the same cause, until the costs of the first suit be paid; but never stays the prosecution of a suit, until the costs of an interlocutory order, made in the progress of the suit be paid."

In *Adams v. Bush*, No 2, (2 *Abb. Pr. N. S.*, 112 [Supm. Ct. Sp. T. 1863]) it was held that leave to renew a motion will not be denied because the costs awarded on the previous application are unpaid, unless it appears that they cannot be collected.

In *Jackson ex dem. Pioneer v. Schaubert* (4 *Wend.* 216), where judgments rendered by the Supreme Court were reversed in the Court of Errors, with costs, and *venires de novo* awarded, the proceedings of the plaintiff were stayed until the payment of the costs in error.

In *Dresser v. Brooks* (5 *How. Pr.* 75 [Ct. App. 1848]) it was held that a second appeal should be stayed because of the non-payment of the costs awarded on the dismissal of a former appeal from the same adjudication.

**Statute applies to what Courts.**—By section 3,347, subd. 6, of the Code of Civil Procedure the provisions of section 779 are made applicable "only to the proceedings taken on or after the first day of September, 1877, in an action or special proceeding in" the supreme court, a superior city court, the city (then marine) court of New York or a county court. Section 2,556 of the Code of Civil Procedure, however, provides, "A direction of a surrogate's court, made or entered in writing, and not included in a decree, is styled an order. It may be enforced in like manner as a similar order, made by the supreme court in an action; and the costs are the same as upon such an order, and may be collected in like manner."

This undoubtedly authorizes the issuance of an execution against personal property to collect the costs, but does not extend the provision of section 779 relating to a stay to surrogates courts. (See *Scotfield v. Adriance*, 2 *Dem.* 486.)

**Who Stayed.**—The party required to pay the costs of a motion, or any other sum of money directed by an order to be paid is stayed. (*Code Civ. Pro.* § 779.) The party in default in paying the costs is stayed. (*Thaule v. Frost*, 1 *Abb. N. C.* 298; *Lyons v. Murat*, 4 *Id.* 13; *Henderson v. Savage* 1 *Mo. Law. Bul.* 60.) The party charged with the costs is stayed. (*Hazard v. Wilson*, 3 *Abb. N. C.* 50.) One who has been substituted as plaintiff in an action upon the transfer of the

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For Non-Payment of Interlocutory Cost.

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cause of action to him, where motion costs awarded against the former plaintiff have not been paid is stayed. (*Gardinier v. Eldred*, 21 *Civ. Pro.* 221.) The assignee of a judgment, proceedings upon which are stayed by the non-payment of motion costs awarded before the assignment is stayed. (*MacWhinnie v. Cameron*, 19 *Civ. Pro.* 168; 8 *C.*, 57 *Hun.*, 463; *Murray v. Cameron*, 15 *N. Y. Supp.* 13; 8 *S. C.*, 38 *St. Rep.* 792.)

The assignee of a cause of action whose assigner has failed to pay motion costs awarded against him is stayed. (*Wessels v. Boettcher*, 142 *N. Y.* 212.)

But the administrator of a deceased plaintiff, who also has a conveyance of the subject of the action, is not prevented by the non-payment of motion costs awarded against the original plaintiff from moving to revive and continue the action, and for his substitution as plaintiff. (*Clute v. Emerich*, 16 *Civ. Pro.* 123.)

**What Actions and Proceedings Stayed.**—A motion to compel the acceptance of a notice of appeal cannot be made while the proceedings of the moving party are stayed by the non-payment of motion costs. (*Cohn v. Husson*, 17 *Civ. Pro.* 434.)

Stay for non-payment of costs of a motion to set aside a taxation of costs, prevents service of notice of appeal from the judgment. (*Gardinier v. Eldred*, 21 *Civ. Pro.* 221.)

Where a motion of the defendant in an action that service of a case and exceptions made by the plaintiff be vacated because the proceedings of the plaintiff were stayed by the non-payment of the costs of a motion to set aside a taxation of costs was granted, an appeal by the plaintiff from the order thereupon entered should not be dismissed because of such stay, as the propriety of the enforcement of the stayed is involved in the appeal. (*Id.*)

Proceedings to review or vacate the order awarding the costs or directing the payment of the money are not stayed. (*Code Civ. Pro.* § 779 as amended by *Laws of 1877 chap.* 542.)

Proceedings necessary to enable the party in default to review the order by an appeal are not stayed. (*Anon.* 4 *Abb.*, *N. C.* 11.)

The stay does not prevent the making of a motion to vacate the order imposing the costs, as irregular. (*Marsh v. Woolsey*, 14 *Hun.* 1.)

The right to review by appeal an order imposing costs carries with it the right to resist the taxation of improper costs upon an affirmance on such an appeal. (*Thalceimer v. Hays*, 6 *St. Rep.* 125.)

A motion to set aside an execution against the person is not a proceeding to review or vacate an order denying a prior motion to set aside an order of arrest, and is stayed by non-payment of the costs of such former motion. (*Knoff v. Ellsworth*, 8 *St. Rep.* 568.)

Failure of the plaintiff in an action to pay the costs of a motion will not prevent the making after her death of a motion by one to whom during life she had conveyed the subject matter of the action

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Note on Stay of Proceedings

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and to whom letters of administration upon her estate had been granted, to revive and continue the action. The Court (VAN BRUNT P. J., DANIELS J., concurring) said "It was necessary that the case should be revived in order that there might be some person who could pay the costs and continue the action. It was not until the action has been actually revived that there was any plaintiff, the plaintiff of record whose proceedings could be stayed, being dead."

The party stayed cannot take judgment against his opponent upon his default in appearing when the case is called on the calendar for trial, although notice of trial has been duly given. (*Brown v. Griswold*, 23 Hun. 618.) Nor can a defendant to whom the costs were awarded, insist that the plaintiff shall not proceed because stayed and at the same time take a dismissal of the complaint. If the defendant insists on the benefit of section 779 of the Code of Civil Procedure, all he should have is a mere stay of proceedings. (*Eisenlord v. Clum*, 17 Civ. Pro. 147; S. C., 52 Hun. 461.)

One whose proceedings are so stayed may serve a purely defensive pleading, as an answer not containing a counterclaim. The statutory provision was not intended to prevent a party moved against from asserting his natural and legal right of self defense. (*Randell v. Abrisqueta*, 20 Abb. N. C. 292; S. C. 2 City Ct. 303.)

Failure to pay costs awarded on dismissing proceedings supplementary to execution, prevents the issuance of execution on the judgment and the making of a levy thereunder. (*MacWhinnie v. Cameron*, 19 Civ. Pro. 168; S. C., 57 Hun. 463.)

It seems that in such case crediting the costs on the judgment would obviate the stay (per BARTLETT, J.,—VAN BRUNT, P. J., and DANIELS, J., not concurring therein) *Id.*

In *Godfrey v. Pell* (5 Mo. Law. Bul. 69), it was held at special term of the N. Y. Superior Court, that a failure to pay costs in supplementary proceedings stays those proceedings only, and not the action.

A motion to set aside an execution as issued without leave of court where leave is necessary, and to vacate an order for an examination in supplementary proceedings is stayed by the non-payment of the costs of a former similar motion made on the ground that the judgment had been paid (*National Bank of Port Jervis v. Hansee*, 7 Civ. Pro. 350).

A motion for judgment on the ground that the defendant's answer is not properly verified, and that a previous order compelling acceptance of service of the answer be vacated because of failure to file the motion papers and to strike out a portion of the answer as sham, etc., is stayed by non-payment of the costs awarded in said former order. (*Mooney v. Ryerson*, 8 Civ. Pro. 435.)

An application for leave to sue as a poor person is stayed by non-

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 For Non-payment of Interlocutory Cost.
 

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payment of motion costs previously granted. (*Lyons v. Murat*, 4 *Abb. N. C.* 13; *S. C.*, 54 *How. Pr.* 23.)

In *Wessels v. Boettcher* (142 *N. Y.* 212), proceedings in an action were held to be stayed, by the non-payment of motion costs awarded against the plaintiff's assignor in a former action on the same claim.

**What Costs or sum of Money.** — "Costs of a motion, or any other sum of money directed by an order to be paid" if "not paid within the time fixed for that purpose by the order, or if no time is so fixed, within ten days after service of a copy of the order." (*Code Civ. Pro.* § 779 as amended by Laws of 1884, Chap. 181.)

The motion costs non-payment of which will stay proceedings, may include the necessary disbursements of the successful party. (*Pitkin v. Cooley*, 5 *Hun.* 48.)

In *Eisenlord v. Clum* (17 *Civ. Pro.* 147, 8 *C.* 52 *Hun.* 461), the general term of the Supreme Court in the third department says, in a *per curiam* opinion, "Section 779 of the Code of Civil Procedure speaks of costs of a motion, or an other sum of money. This language does not apply to the costs of an appeal from an order granting a new trial on the merits. The costs granted on such an appeal are not costs of a motion or a sum of money directed by an order to be paid." To precisely the same effect, is *Van Woert v. Ackley*, 56 *Hun.* 375.

In *Verplanck v. Kendall* (47 *N. Y. Super.* [15 *J. & S.* 513], decided in 1880, and *Woodbridge v. Nelson*, (1 *Mo. Law. Bul.* 27), decided in 1879, it was held that non-payment of costs awarded an appeal from an order do not stay the proceedings of the party against whom they were awarded.

In *Cohn v. Husson*, (17 *Civ. Pro.* 434), it was held that non-payment of the costs awarded by an order of the general term reversing an order of the special term granting a motion, stayed all proceedings on the part of the party required to pay them.

Judge FREEDMAN, delivering the opinion of the general term of the Supreme Court in that case says with reference to *Verplanck v. Kendall* above cited: "That case was decided in 1880, and at that time section 779 of the Code read as follows: 'Where costs of a motion directed by an order to be paid, are not paid,' etc. It was upon this language that it was held by this court that costs of a motion did not include costs of an appeal from an order. In *Phipps v. Carman* (26 *Hun.* 518), decided in 1882, the general term of the Supreme Court of the second department reached a different conclusion. The conflict between the two decisions was settled by the passage of chap. 181, Laws 1884, by which section 779 was amended so as to be read as follows: 'Where costs of a motion, or any other sum of money directed by an order to be paid are not paid,' etc. Under this section, as thus amended non-payment of any sum of money directed by an order to be paid, is made by law a ground for staying further proceedings in the action on the part of the party thus in default, and the section

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 Note on Stay of Proceedings
 

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applies to all orders, irrespective of the question whether they have been made at special or general term."

In *Carrigan v. Washburn* (18 *Civ. Pro.* 79) it was held, by McADAM Ch. J., at special term of the City Court of New York that costs of an appeal from an order vacating an execution against the person are "in the nature of motion costs" collectable in the manner provided by *Code Civ. Pro.* § 779. See also, *Quin v. Waiter*, 18 *Civ. Pro.* 122.

Costs of an appeal from an order were also held to be motion costs in *Place v. Hayward*, (8 *Civ. Pro.* 352); *McIntyre v. German Savings Bank*, (59 *Hun.* 536); *In re Brasier*, (13 *Daly*, 245); *Phipps v. Carman*, (26 *Hun.* 518).

In *Weasels v. Boettcher* (142 *N. Y.* 212), BARTLETT, J., delivering the opinion of the court of appeals in which all concurred, says:

"It appears that the plaintiffs are the assignees of the claim sued on herein; that their assignors had previously sued thereon and obtained an attachment which was vacated by the court granting it. and the order affirmed in this court (138 *N. Y.* 654); that this action was brought before said motion costs were paid, and while plaintiffs' assignors were stayed under the provisions of section 779 of the Code of Civil Procedure."

Section 779 applies, it seems, to motion costs granted in a special proceeding, directed by an order, and that whether order is an order of the court or of a judge; but does not apply to a final order in such a proceeding,—e. g. the \$30 costs of supplementary proceedings the allowance of which is authorized by statute. (*Valiente v. Bryan*, 3 *Civ. Pro.* 358.)

Section 779 applies to a case where the attorney for a defendant was ordered to pay to the plaintiff costs of opposing a motion for a new trial received by him under an order which was modified on appeal. (*Forstman v. Schulting*, 42 *Hun.* 643.)

**When Stay takes Effect.**—Where payment is not made "within the time fixed for that purpose by the order, or if no time is fixed within ten days after service of a copy of the order" proceedings on the part of the party required to pay "are stayed without further direction of the court" (*Code Civ. Pro.* § 779.)

The proceedings are absolutely stayed upon the failure to pay the costs imposed within the time given by the order or by statute. (*Thaule v. Frost*, 1 *Abb. N. C.* 298; *Lyons v. Murat*, 4 *Id.* 13; *Henderson v. Savage*, 1 *Mo. Law Bul.* 60, and see *Hazard v. Wilson* 3 *Abb. N. C.* 50; *National Bank of Port Jervis v. Hansee* 7, *Civ. Pro.* 350.)

The stay of proceedings begins only from the default in not paying the costs and that if no time is specified in the order the default does not exist until ten days after service of a copy of the order, or if the service is by mail, until twenty days thereafter. (*Marks v. King*, 13 *Abb. N. C.* 374; 8 *C.*, 66 *Hor. Pr.* 453; *Pettibone v.*

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For Non-Payment of Interlocutory Cost.

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*Drakeford* 1 *How. Pr. N. S.* 141; see also *Wellman v. Forst.* 38 *Hun.* 389 )

Where an order awarding motion costs is substituted for a former order to similar effect, a copy of the substituted order must be served upon the party charged with costs, before his failure to pay costs will stay his proceedings. (*Thalceimer v. Hays*, 6 *St. Rep.* 125.)

**When terminated.**—Upon payment of the costs. (*Code Civ. Pro.* § 779.)

The party charged with costs when a stay is claimed, must show payment, if any; it cannot be presumed to have been made. (*Ager v. Ager*, 1 *Mo. Law. Bul.* 2.)

**Waiver of Stay.**—"The adverse party may at his election waive the stay of proceedings." (*Code Civ. Pro.* § 779.) A refusal of costs tendered by the party charged therewith is a waiver of a stay of proceedings until payment. (*Kiefer v. Grand Trunk Ry. Co.* 37 *St. Rep.* 306; 8 *C.*, 13 *N. Y. Supp.* 860; appeal dismissed, without opinion, 128 *N. Y.* 658.)

Service of notice of trial by the party to whom the costs are awarded, after the time for paying them is past, waives the stay. (*Verplanck v. Kendall*, 47 *Super. Ct. [J. & S.]* 513.)

Rule 9 of the General Term of the Supreme Court, first department, adopted October 28th, 1887, provided, that "the objection that proceedings are stayed for non-payment of any costs will not be heard in this court when the cause or motion is called on the calendar, unless at least twenty-four hours' notice, in writing, that such objection will be made, has been given to the opposite party."

**Effect of Stay.**—The effect of the stay is not to render proceeding taken in violation of it void or to "deprive the Court of jurisdiction when set in motion by the party resting under a stay. The only effect is to render the proceedings irregular, and when brought to the attention of the Court the party violating the stay will be dealt with as may be proper." Where the proceedings in an action are stayed, the regularity of an attachment issued therein while the stay is in force, is in no way affected by the stay of proceedings and its violation, and it is competent for the Court to deny a motion to vacate the attachment on this ground, on condition that the costs are paid in twenty days—so held where the stay resulted not from the non-payment of costs in the action itself, but from the non-payment of motion costs imposed against the plaintiff's assignor in a former action on the same claim. *Wessels v. Boettcher*, 124 *N. Y.* 212.

"The Court is powerless," while the stay continues, to entertain another motion. (*National Bank of Port Jervis v. Hausse*, 7 *Civ. Pro.* 350.)

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Van Camp v. Searle.

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VAN CAMP, RESPONDENT, v. SEARLE, AS SHERIFF OF  
THE COUNTY OF ORLEANS, *et al*, RESPONDENTS,  
THE ORLEANS COUNTY NATIONAL BANK,  
*et al*, APPELLANTS.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,  
JUNE, 1894.

§§ 66, 635, *et seq.*, 636, 641, 644, 649, 682, 697, 706,  
1369, 1370, 1406, 1434, 1438, 1457.

*Attachment—when sufficiency of affidavits may be attacked—recitals of grounds in warrant—effect of withdrawal of execution on lien of attachment—attachment in action against executor—levy on real property—distribution of proceeds of sale—action against executor for account—attorney's lien.*

The facts that the affidavits upon which an attachment was granted are insufficient in failing to state facts showing the departure of the defendant from the state with intent to defraud his creditors and to avoid the service of a summons upon him, which were the grounds of the attachment, cannot be taken by another attaching creditor after the recovery of judgment by the first creditor and the issuance and satisfaction of an execution thereon [1].

*It seems that where the summons in an action was served by publication, the sufficiency of the affidavits to secure the order of publication are essential to bring the action within the jurisdiction of the court, and if not sufficient a judgment taken in the absence of appearance is void, and the plaintiff in it acquires no rights under or through mesne or final process in the action [2].*

So far as processes which come into the hands of a sheriff are regular on their face, he is justified in the execution of them [3].

Where after the issuance and levy of an attachment in an action judgment was recovered and the plaintiff therein issued a general execution upon which payment was made by the sheriff, but afterwards the money was refunded and a special execution according to the provisions of section 1370 of the Code of Civil Procedure was issued and the amount of the execution paid in satisfaction thereof,—*Held* that although the first execution was irregular, the error was corrected by the refunding of the money and the issuance of an execution in the proper form, and this notwithstanding by the expiration of the term of his office, the officer to whom it was issued had, at the time of such issuance, ceased to be sheriff [4].



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In such case, the proceeds applicable to the discharge by payment of the lien of the attachment may be deemed to have been held by the sheriff for that purpose until paid in satisfaction of the execution which was regular in form [5].

Where the affidavits upon which an attachment was issued states and recites facts and circumstances to show that the defendant has departed from the state where he resided with the intent to defraud his creditors, a statement in the warrant as the ground thereof "that the defendant has absconded from the county of Orleans, the place of his residence with intent to defraud his creditor" while not a statement of a statutory ground for the issue of such process, is not fatal to its validity [6].

Where in an action in which an attachment was granted the execution is issued in the form prescribed by section 1369 of the Code, —*Held*, that this was irregular as the provisions of section 1370 of the Code of Civil Procedure are imperatively applicable to execution issued upon a judgment recovered in an action in which an attachment has been issued and levied, and the summons not personally served; that the execution was void, and the sheriff to whom it was issued was not justified in making payment thereof [7].

Where after the commencement of the advertising of the sale of real property under execution, another execution against the same debtor was issued to the sheriff, and the sale was postponed, and notice thereof published for at least six weeks, —*Held*, that the sale could properly have been made by virtue of the latter execution pursuant to the notice given by the sheriff of the sale and that he was not at liberty to treat the sale as made only upon the other executions in his hands, that the sale should be deemed to have been made by virtue of such later execution, although it was not mentioned either in the advertisement or certificate of sale [9].

It is not necessary that the execution under which a sale of real property is made be specified in the notice or certificate of sale [8].

Where an attachment was levied upon real property and thereafter it was sold under and by virtue of several executions issued upon judgments, the liens of which were subordinate to the attachment liens, the right of one of the attaching creditors to a share in the proceeds of such sale according to the priority of his lien is not affected by the fact that after the commencement of the advertising of the sale but before the sale, an execution issued upon a judgment recovered by him was withdrawn [10, 12].

The purpose of the levy of an attachment upon real property is to create a lien as of that time, and such is the effect of it; so that, when a judgment is recovered in the action, it, for the purpose of the execution of such lien, has relation to the time the attachment

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was levied, and when the property is sold by the sheriff upon an execution issued on a judgment which is a prior lien to that of the attachment, the lien of the latter is available in satisfying the judgment of the attaching creditor or to much of it as the funds applicable to its payment will satisfy [11].

Where a judgment recovered by B. against V. C. had been set-off against an equal amount of judgment in favor of V. C. against her by a order which provided that such off-set should not prejudice any lien which V. C.'s attorneys had upon her judgment, and it appeared that her attorneys had rendered services and paid out money for her in the action in which the judgment was recovered and in other actions relating to the subject matter of that action, and that such services and disbursements were at least equal to the amount of the judgment in her favor.—*Held*, that the attorneys might be regarded as equitable assignees of the judgment, that they had a right to make their lien available by process of execution and that the existence and extent of such lien was properly established by evidence in support of the execution issued in their behalf [13].

*It seems* that in an action against an administrator for an accounting, an attachment cannot be issued against the defendant's property [15] and that unless special circumstances exist as a reason for bringing an action the jurisdiction of the surrogate's court to require such an accounting is exclusive [16].

An action may be brought by an administrator *de bonis non* to recover from her predecessor in office moneys which came into his hands belonging to the estate, which he had failed to pay over [14, 17, 19], and in such action, an attachment may, upon proof that he has departed from the state with intent to defraud his creditors be issued [19].

*Walton v. Walton* (40 N. Y. 15; S. C., 4 Abb. Ct. App. Dec. 512, 2 Abb. Pr. N. S. 428), followed [18].

The liability of an executor for professional services performed for him by an attorney is personal [20].

The levy of an attachment is essential to make it available as a lien or to create by it security for payment of the judgment which may follow, and it is the duty of the sheriff to whom an attachment is delivered to immediately levy it upon the property, personal and real, of the defendant sufficient to satisfy the demand if it can be found, and if there are more than one attachments, in the order in which they are received by him, and he is liable to the plaintiff for the consequences of his neglect so to do [21].

Where several attachments are issued to the same officer the rule of preference relating to executions upon personal property is applicable to the attachments whether they are levied upon personal or real property, and the proceeds of the sale of such property

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should be applied to the payment of the attaching creditors in the order in which their attachments were issued, and not in the order in which the attachments were levied, and a sale upon execution issued upon one or more of the judgments of the attaching creditors gives those issuing such processes no advantage over the others [22].

An assignment of accounts by an attachment debtor is not effectual to transfer to the assignee the proceeds thereof to the prejudice of attaching creditors, [23] and where payment of such accounts is made by the debtors to the sheriff, the amount so received by him is charged with the lien of the attachments in his hands in the order of the delivery of them to him [24].

Where a judgment was recovered by default after service of the summons in an action by publication and thereafter another action upon the same claim was commenced, and judgment recovered therein by default, the validity of the second judgment cannot be attacked by any person other than the judgment creditor, no one else being prejudiced thereby and it not being void.

(Decided, June 20, 1894.)

Appeal by the defendant, the Orleans County National Bank and others from a judgment of the special term of the supreme court in Orleans county determining the rights of the parties to this action to the moneys derived from certain sales under executions.

This action was brought to ascertain and determine how the proceeds of the sale of certain property of one Benjamin Van Camp, who was a debtor of the plaintiff and the defendants, other than the defendant Searle, should be applied. The moneys received by the sheriff, less his fees amounted to \$9930.18 and were derived as follows:— from the sale of real estate, \$6177, less sheriff's fees and expenses, amount to \$105.75 leaving a balance of \$6071.25; proceeds of the sale of certain grass and fruits on said premises \$387.48, less sheriff's fees and expenses \$35.53, leaving a balance of \$351.95; proceeds of the sale of personal property, \$3225.44, less sheriff's charges, \$225.53, leaving a balance of \$2999.91; proceeds of

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accounts collected \$510.12, less sheriff's charges \$3.05, leaving a balance of \$507.07.

Other facts appear in the opinion.

*George Bullard*, for defendants, appellants, Orleans Co. Nat. Bank and Sawyer.

*Horace McGuire*, for defendants, appellants, Buell & Bloss.

*David N. Salisbury*, for plaintiff and defendants, appellants, Keeler & Salisbury.

*S. E. Filkins*, for defendant, respondent, Searle.

*Signor & Wage*, for defendants, respondents, Blood, and another.

*John Cunnon*, for defendant, respondent, Hallock.

*Thompson & Spencer*, for defendants, respondents, Rice and Briggs.

BRADLEY, J.—The purpose of the action is the determination of the rights of the parties, other than the defendant Searle, as sheriff, to the proceeds of the property of Benjamin Van Camp.

He was treated as an absconding debtor, and, in more than twenty actions instituted against him, warrants of attachment against his property were issued, and delivered to Searle, the sheriff of Orleans county. Some of them were levied upon his personal property and the others and the most of them were levied upon both real and personal property; and although, after the levy of the attachments, a large number of judgments were entered upon his confession, the controversy in this action has relation mainly to those parties in whose behalf attachments were issued, and levied on the property of the debtor.

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The defendant Searle, as sheriff, paid out of the proceeds of the personal property the amounts of the judgments recovered by defendants Mary J. Blood, Delle W. Blood, Bidelman, Chester, Coann, and Rice, and returned the executions issued upon their judgments "Satisfied." He also paid to defendant Bruner \$96.65 of the amount of his execution. Warrants of attachment were issued in the actions in which those judgments were recovered, and the levy of them by the sheriff upon the personal property was prior to that in behalf of any other of the parties; and those payments, with the sheriff's fees and poundage exhausted all the proceeds of the personal property, except \$110.82.

The payment of the executions in favor of the defendants Blood is challenged for the alleged reason that their warrants of attachment had not the support of affidavits sufficient to justify their issue, and a like objection is made to the order for service of the summons by publication. The affidavits to obtain those attachments were alike in their provisions, and while they stated that Van Camp had [1] departed from this state with the intent to defraud his creditors, and to avoid the service of a summons upon him they failed to state any facts tending to support such charges, and were therefore insufficient to protect the attachments, against a motion to vacate them. But no such motion was made, and as the money has been paid upon their judgments and executions, in discharge of the lien, the question of the insufficiency of the affidavits is not, as against those parties, available to the appellants. (*Code Civ. Pro.* § 682; *Woodmansee v. Rogers*, 82 N. Y. 88.)\*

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\*A levy under execution upon the attached property is not such actual application of the attached property or its proceeds to the payment of the judgment recovered in the action "as will prevent the making by a junior lien or of a motion to vacate (*Woodmansee v.*

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As the summons in each of those actions was served [2] by publication, the sufficiency of the affidavits was essential to bring the actions within the jurisdiction of the court; and if they did not come up to the statutory requirement in support of the order of publication, the judgments were void and the plaintiffs in them acquired no rights under or through *mesne* or final process in their actions. (*Fischer v. Langbein*, 103 N. Y. 84). The view taken is that the affidavits upon which the orders of publication were founded were such as to render the service of the summonses made in each of those cases effectual.

The objection urged against the application of the payment to the satisfaction of Bidelman's execution relates only to the sufficiency of the affidavit upon which the attachment was issued. So far as the defendants Bidelman, Chester, and Rice are concerned, what has been said about the payment of the executions of the Bloods is applicable to them, and in a like manner to the amount paid upon defendant Bruner's execution. As Coann is not a party to this action, no inquiry is required about the payment of his execution; and, so far as the processes which came to the hands of the sheriff were regular on [3] their face, he was justified in the execution of them.\* (*Savacool v. Boughton*, 5 Wend. 170; *Sheldom v. Van Buskirk*, 2 N. Y. 473; *Woolsey v. Morris*, 96 Id. 315).

[4] The first execution which came to him upon the

*Rogers*, cited *supra*) and such a motion may be at any time before the money has actually been applied in payment of the judgment (*Parsons v. Sprague*, 3 Civ. Pro. 290; *Thompson v. Culver*, 24 How. Pr. 286; *Zeregal v. Benvist*, 33 Id. 129; *Bowen v. First National Bank*, 34 How. Pr. 408) and may be made even after the giving of the bond provided for in § 688 (*Garbutt v. Hass*, 15 Abb. Pr. 189; *Rowles v. Hare*, 61 Barb. 266; *Clafins v. Baere*, 57 How. Pr. 78).

\* The question as to how far an officer is protected for acts done under irregular process issued to him is learnedly and exhaustively considered in *Piegras v. Edmunds*, 23 Civ. Pro. 241.

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judgments of defendants Blood were general executions provided for by section 1369 of the Code and he paid them. Afterwards, and before those defendants became parties to this action, they refunded to defendant Searle the amount so paid them, and thereupon special executions, according to the provisions of section 1370, were issued to him, and he paid to them, thereon, respectively, the amounts of the executions. The former were irregular, and the latter were regular upon their face, for the purpose of collection or payment from the proceeds of the attached property. The error was cured by the refunding of the money, and the issue of the execution in proper form, and the satisfaction of them, although, by expiration of the term of his office, the defendant Searle had ceased to be sheriff at the time the second executions were issued to him. *Code Civ. Pro.* § 706. The proceeds applicable to the discharge by payment of the liens of their attachments may be deemed to have been held by him for that purpose until paid in satisfaction of the executions, which were regular in form, issued to him (*Lynch v. Crary*, 52 N. Y. 181).

And there seems to be no difficulty about the regularity, on their face, of the attachments and executions of the parties to whom the payments were so made, other than the attachment of the defendant Bidelman and the execution of the defendant Bruner. In that attachment it was [6] recited that it appears by the affidavit "that the said defendant has absconded from the county of Orleans, the place of his residence, with intent to defraud his creditors." The statute provides that the warrant "must briefly recite the grounds of the attachment." *Code Civ. Pro.* § 641. The recital in the Bidelman attachment is not a statutory ground for the issue of such process. *Id.* § 636. In the affidavit upon which it was issued, the ground stated for the application is that Van Camp had departed from this

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state, where he resided, with the intent to defraud his creditors; and some facts and circumstances are there mentioned, intended to support that allegation, and, although somewhat slender, they are such as to justify that conclusion, and give support to the attachment. For that reason the incomplete recital in the process is not fatal to its validity.\*

The execution issued upon the judgment recovered

[7] by the defendant Bruner is not set out in the record,

but the court found that it was issued in the form prescribed by section 1369 of the Code. This was irregular, and as the provisions of section 1370 are imperatively applicable to an execution issued upon a judgment recovered in an action in which an attachment is issued and levied, and the summons not personally served, the execution was void (*Place v. Riley*, 98 N. Y. 1; S. C., 7 Civ. Pro. 403; affirming 4 *Id.* 394). The sheriff, therefore, was not justified in making payment upon that execution.

The question as to the validity or regularity of the payments made upon the executions of defendants Bidelman and Bruner is not raised by exceptions of any of the appellants, other than Keeler and Salisbury.

The real estate of Van Camp, upon which attachments were levied, was sold by virtue of executions on the 15th day of February, 1889; and on the part of the appellants, other than Keeler & Salisbury and the plaintiff, it is insisted that the proceeds of the sale were applicable only to the executions which were in the sheriff's hands at the time of the first publication of his notice of sale, and at the time the sale was made, and that, as the consequence, the proceeds of the sale were not applicable to the execution of the *Cornelia Brown* judgment, the executions upon

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\* A misstatement of the grounds of an attachment in the warrant seem to be a mere irregularity and not a jurisdictional defect. (*First Nat. Bank v. Bushwick Chem. Works*, 17 Civ. Pro. 229).



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the judgments of Adason Kelsey, as administrator, etc., and of Keeler & Salisbury, or any of them. By the notice first published October 29th, 1888, the sheriff advertised the real estate for sale on the 15th of December following. In that notice he stated that by virtue of several executions issued out of the supreme court, to him directed and delivered, against the property of Benjamin F. Van Camp he had seized all the right, title, and interest which Van Camp had in the real property described, on June 11th, 1888, or at any time thereafter, and that he would expose such property for sale December 15th, 1888, at the hour and place mentioned. By notice dated the latter day, he stated that the sale was postponed until February 15th, 1889; and by further or supplementary notice, dated December 18th, 1888, by him subscribed, the sheriff stated that by virtue of several attachments and executions issued out of the supreme court, wherein Orleans County National Bank and John G. Sawyer, respectively, were plaintiff's, and Van Camp, defendant, he had levied upon the right, title, and interest which Van Camp had in the property described in the foregoing notice (before mentioned), on the 14th day of June, 1888, or at any time thereafter, and would sell the property on February 15th, 1889, and then stated the amounts of such judgments of the bank and Sawyer.

The property was sold on that day, and, from the time of such postponement up to the time of the sale, all of those notices were published together, weekly. By the certificate of sale the sheriff certified that he sold the property by virtue of executions issued on judgments recovered against Van Camp by Hallock, Briggs, Buell, Bloss & Buell, Orleans County National Bank, and Sawyer, respectively, for the amounts stated in the certificate. The attachments in behalf of those judgment creditors issued to the sheriff in the order they are above named, except as to

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those of the Bank and Sawyer. They were issued to him at one and the same time.

If the proceeds of the sale had been applied only to the payment of the executions in the sheriff's hands at the time of the sale, they would have been fully satisfied, but such is not the judgment entered upon the direction of the trial court. The distribution of the proceeds directed by the judgment was that they be applied to the payment of the Brown judgment, and to those of the attaching creditors, in the order in which the attachments had been delivered to the sheriff. The execution before mentioned, upon the Brown judgment, was issued pursuant to an order granting leave to issue it, and on or about the 1st day of December, 1888, was delivered to the sheriff; and, although the original notice of sale had then been published for some weeks, the notice of postponement, with that following it, as we have seen, was duly published and given by the sheriff for at least six weeks after the receipt by him of such execution, and there is no available objection, founded upon the notice, why the sale may not properly have been made by virtue of that execution. There was none in the fact that the sheriff stated in the notice that he had seized the right, title, and interest which Van Camp had in the land on June 11th, 1888. That was the day on which the first attachment was delivered to him. The lien of the Brown judgment was then prior to that of any of the attachments, and, so far as appears, there was no lien upon the premises intermediate the time of the entry of such judgment and June 11th, 1888. The statute does

- not require that the execution upon which a sale of
- [8] real property is made be specified in the notice or certificate of sale. *Code Civ. Pro.* §§ 1434, 1438. If, as it thus far appears, the sale may properly have
- [9] been made by virtue of the Brown execution, pursuant to the notice given by the sheriff of the

sale, he was not at liberty to treat the sale as made only upon the other executions in his hands at the time of the sale. It must therefore, for aught that yet appears, be deemed to have been made by virtue of that execution, as well as of those mentioned in the certificate of sale.\*

The executions of the attaching creditors Keeler & Salisbury, and Kelsey, as administrator, etc., were on the day of, and prior to, the sale withdrawn from the sheriff, and, immediately after the sale, executions upon their judgments were placed in his hands. It is urged on the part of the appellants other than the plaintiff and Keeler &

[10] Salisbury that those creditors, by withdrawing the executions, denied to themselves the right to have their judgments paid from the proceeds of the sale. This is so, unless the levy of their attachments saves their right to share in such proceeds. The executions evidently were withdrawn to enable those creditors to redeem the property

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\* In *Husted v. Dakin*, 17 *Abb. Pr.* 137, the Supreme Court at special term in 1857, held, that a sale of real property advertised under specified executions was not to be deemed to have been made under an execution delivered to the sheriff after the first publication of the advertisement and not referred to in the notice of sale, although the sale was postponed for more than six weeks after the issue of the junior execution and such postponement duly advertised.

In *Mascraft v. Van Antwerp*, 3 *Cow.* 334, decided by the supreme court in October, 1824, an execution upon a justice's judgment docketed May 6th was issued on May 11th. Thereafter on the same day another execution in favor of another creditor upon a supreme court judgment, docketed March 18th, was issued to the same sheriff. The sheriff advertised for sale under the first execution delivered to him, two small lots of land, and thereafter sold them, and the question was submitted to the court whether the sheriff should in the certificate of sale refer to both executions or only to the one mentioned in his advertisement. The court said, "As the sheriff advertised on one execution only, he can state no other in the certificate or deed of sale; but the whole sum bid by Mascraft should be inserted, so that the debtor or a creditor coming to redeem may know the amount of principal and interest he is to pay, and the purchaser, on the other hand, be secure of receiving the amount which he has paid."

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from the sale, if they should be so advised. This they could not do if their executions had remained in the sheriff's hands at the time of the sale, as then the sale would have been made on them, as well as the others held by him. *Code Civ. Pro.* § 1457; *Ex parte Paddock* 4 *Hill*, 544.

But those whose executions were withdrawn were attaching creditors, and their attachment liens were prior to those of the other appellants; and assuming that the premises were sold upon the execution issued upon the Brown judgment, which was a lien senior to that of any of the attachments, the sale was such as to vest title, when perfected in the purchaser, free from the lien of them, and it would seem that the proceeds, for the purposes of the lien of the attachments, became the substitute for the property upon which they were levied, else there would be no remedy for those attaching creditors whose executions were not in the sheriff's hands at the time of the sale, other than that of redemption. This would practically deny to them any benefit of the lien of their attachments.

The purpose of the levy of an attachment upon real [11] property is to create a lien as of that time, and such is the effect of it; so that, when a judgment is recovered in the action, it, for the purpose of the execution of such lien, has relation to the time the attachment was levied, and, when the property is sold by the sheriff upon an execution issued on a judgment which is a prior lien to that of the attachment, the lien of the latter is available, in its order, upon the proceeds of the sale, for the purpose of relative satisfying the judgment of the attaching creditor, or so much of it as the fund applicable to its payment will satisfy. This was the right of all those creditors, in the present case, whose attachments were effectually levied upon the real property which was sold, whether or not their

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executions were in the hands of the sheriff at the time of the sale. *Code Civ. Pro.* § 641.

And, therefore, the creditors whose executions were  
[12] withdrawn from him, as before mentioned, were not, by the withdrawal of them, prejudiced in their right their to take payment from the fund in the order of the lien of attachments. For the purpose of obtaining such payment, executions in behalf of all the creditors to whom payment was, by the judgment herein, directed to be made, were issued, and delivered to the sheriff.

It is insisted that the judgment recovered by Cornelia  
[13] Brown against Van Camp was not effectual to support the execution issued upon it, or to require the payment of it by the sheriff,—because it had been set off against an equal amount of judgments of Van Camp against her. This had been done by an order of the court, on his motion, but the order provided that such offset should not prejudice any lien which the defendants Keeler & Salisbury had upon the Brown judgment. They, as appears by the evidence, and facts found by the court, were attorneys and counselors at law, constituting the firm of Keeler & Salisbury, and as such had rendered services and paid out money for her in the action in which the judgment was recovered, and in other actions relating to the subject-matter of that action; and such services rendered and disbursements made by them for her, and at her request, were at least equal in value and amount to that of such judgment. They may be regarded as the equitable assignees of the judgment. (*Haight v. Holcomb*, 16 *How. Pr.* 173.)\* And they had the right to make it available, by process of execution, to satisfy their lien charged upon it. (*Code Civ. Pro.* § 66; *Martin v. Hawks*, 15 *Johns*, 405; *McGregor v. Comstock*, 28 *N. Y.* 240; *Goodrich v.*

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\* See the same effect *Smith v. Chenoweth*, 12 *Civ. Pro.* 89, and cases there cited.

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McDonald, 112 *Id.* 157). Those attorneys did not consent that any set-off be made of the judgment, to the prejudice of their lien, and it was preserved by the terms of the order; and no reason appears why the existence and extent of their lien was not properly established by evidence in this action in support of the execution in their behalf, as found by the trial court.\*

It is urged by the learned counsel for the appellants [14] the Bank and Sawyer that the cause of the Kelsey action was not such as to permit the issue in it of the attachment in his behalf. Prior to the time of the commencement of that action, Benjamin F. Van Camp had been the executor of the last will and testament of Amos Kelsey, deceased, and having failed to render his account as such, and left the state under the circumstances which he did, letters testamentary were by the surrogate revoked, and Adason Kelsey was appointed administrator with the will annexed and thereupon the latter, as such administrator, commenced his action against Van Camp, and caused an attachment therein to be issued against his property. The complaint was of considerable length, and by it, among other things, the plaintiff alleged that Van Camp, having property and money of the Kelsey estate in his hands, had been required and failed to render to the surrogate his account; that he had been removed from his position of trust, as executor, and the letters testamentary issued to him revoked; and that he had "wrongfully and unlawfully disposed of and converted the said property and money to his own use, to the damage of the estate of the said Amos Kelsey, in the sum of \$10,000." Judgment against him was demanded accordingly.

The ground of the attachment, as recited in it, was that the action was brought to recover "a sum of money

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\* See *Hussey v. Culver*, 30 *St. Rep.* 836; S. C., 9 *N. Y. Supp.* 193.

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only, as damages for wrongful conversion of personal property, as will more fully appear by the complaint, and that a cause of action exists against said defendant in favor of said plaintiff, for the sum stated in said affidavit, and that the defendant Benjamin F. Van Camp has departed from the State of New York, where he has been a resident, and with the intent to cheat and defraud his creditors, and to avoid the service of a summons upon himself." The complaint may import the purpose to recover against the defendant therein as for a conversion of personal property, and, as such the action came within those in which the statute permitted the issue of an attachment. But in view of all the allegations of the complaint, such was not necessarily the nature of the action; nor was it of the recovery, as appears by the facts proven before the referee, and by his report, upon which the judgment was entered.

If, as insisted on the part of those appellants, the  
 [15] action was for an accounting, as such, the plaintiff in it was not entitled to an attachment, and none could issue, because it would not then have come within the provisions of the statute permitting the issue of such process. (*Code Civ. Pro.* § 635; *Thorington v. Merrick*, 101 *N. Y.* 5; *Ackroyd v. Ackroyd*, 20 *How. Pr.* 93.)\* And it has been held in *Morse v. Smith* (17 *N. Y. Supp.* 385; *S. C.* [16] 42 *St. Rep.* 168) that unless special circumstances

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\* An attachment cannot be granted in an equitable action, (*Shaffer v. Mason*, 18 *Abb. Pr.* 291; *Guilhon v. Lindo*, 9 *Bosc.* 601; *Ackroyd v. Ackroyd*, 20 *How. Pr.* 93; *Ebner v. Bradford*, 3 *Abb. Pr. N. S.* 248; *Thorington v. Merrick*, 22 *Weekly Dig.* 462).—*e. g.*, to foreclose a mortgage (*Van Wyck v. Bauer*, 9 *Abb. Pr. N. S.* 142); to determine whether lands are held in trust and for an accounting (*Thorington v. Merrick*, *supra*); for dissolution of copartnership and an accounting (*Ketchum v. Ketchum*, 1 *Abb. Pr. N. S.* 157); for the rescission of a sale of land because of fraud (*Crossman v. Lindsley*, 42 *How. Pr.* 107) to enjoin the infringement of a trademark, (*Guilhon v. Lindo*, 9 *Bosc.* 601.)

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exist, to permit an action therefor, it will not be entertained, to require an executor or administrator to render an account, as for such purpose the jurisdiction of the surrogate's court is deemed exclusive (*Code Civ. Pro.* § 2472, subd. 3), and was questioned in *Hard v. Ashley*, 117 *N. Y.* 606.

The defendant in the *Kelsey* action had ceased to be [17] executor at the time it was commenced. It was, therefore, not brought to require Van Camp to account, with a view to have him administer the estate which had come to him, of the decedent. Its purpose was to recover the amount of the property and moneys which he had, as executor, taken into his possession, so far as the same remained unadministered by him; and if, for the purpose of such remedy, special circumstances were required, they existed in the fact that he had left the state, and was not subject to the direction of the surrogate's court. So far as related to the money into which he had converted the assets which came to him, he had only partially administered them, and the plaintiff was entitled to the money, and no reason appears why he could not maintain an action to recover it.

In *Walton v. Walton*, (40 *N. Y.* 15; *S. C.* 4 *Abb. Ct. of App. Dec.* 512, 2 *Abb. Pr. N. S.* 428) it was held that such an action was maintainable by an administrator *de bonis non* against the personal representative of an executor who had died without having fully administered the assets which came to him; and Judge HOGEBOM there remarked that an action may be brought by the plaintiff, "to recover the property, against any person in possession of it; trover or replevin, if it exist in specie, . . . or assumpsit or other appropriate action, if it has been converted into money."

The action was not necessarily one for an accounting but in view of what followed, may be treated as an action to recover the amount of money which, in the execution of



his trust, Van Camp had derived from the assets which came to him as such executor, and which he was liable to pay over to the plaintiff, his successor. And it seems that before the plaintiff in that action proceed to judgment, Van Camp returned to this state, and stipulated that on June 4, 1888, there was in his hands \$1840.31 in money, belonging to the Amos Kelsey estate; that such money was subject to the payment of \$622.62 to Keeler & Salisbury for legal services, etc. And he stipulated that judgment might be taken in the Kelsey action against him for \$1840.31, and interest from June 11, 1888, with costs. The judgment was accordingly entered December 7, 1888

We are inclined to think that the action was well [19] brought by Kelsey, as administrator, etc., against

Van Camp, and that the alleged cause of action was such as to permit an attachment to issue.

The defendants Keeler & Salisbury, having commenced against Van Camp their action to recover for professional services performed by him, in his matters as executor, etc., of Kelsey, deceased, procured a warrant of attachment to be issued therein to the sheriff, June 13, 1888. It was levied upon the real and personal property of Van Camp. Afterwards, and before judgment, the attachment was levied upon certain accounts of Van Camp, against persons, for sums due from them to him, and thereafter the sum of \$130.04 was collected by the sheriff on such accounts.

Prior to the stipulation and judgment in the Kelsey action, and on December 3, 1888, Keeler & Salisbury recovered judgment in their action for \$622.62 damages and \$119.98 costs. Afterwards, an accounting was had by Van Camp in the surrogate's court, and on October 8, 1889, a decree was there made stating the amount of money, etc., of the Kelsey estate in his hands; and after referring to the recovery of the Kelsey judgment of

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December 7, 1888, against him, and the Keeler & Salisbury claim, for which he had not been credited, the decree directed that, out of the funds of the estate of the decedent, the administrator with the will annexed pay to Keeler & Salisbury \$622.62 and interest, amounting together to \$667.76. Thereafter, and on the same day, Adason Kelsey, as such administrator, assigned his judgment to the plaintiff in this action, and received, as the consideration of the assignment, the full amount of it. And thereupon he, by written instrument to that effect, as such administrator, certified and acknowledged that he had, by such assignment realized upon the surrogate's decree \$2186.66, being the amount of the judgment so assigned. On the same day, Keeler & Salisbury assigned to the administrator the damages in their judgment against Van Camp, and received from him the amount of such damages. They reserve for themselves the costs on the judgment, with the right to enforce it in their behalf to that extent. So that all that remained unsatisfied of the judgment recovered in their action was \$119.98. the costs, and interest upon that sum.

The liability of Van Camp to Keeler & Salisbury was [20] personal, notwithstanding the services were performed for him in his business as executor of Kelsey's will (*Mygatt v. Wilcox*, 1 *Lans.* 55; *aff'd.*, 45 *N. Y.* 306; *Bowman v. Tallman*, 2 *Robt.* 385.) \* No reason now appears why the judgment, to the extent of and for the costs included in it, is not available to Keeler & Salisbury.

In respect to the proceeds of the accounts collected by the sheriff, and of the sale of the real property, the ques-

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\* See also to same effect, *Matter of Halsey*, (13 *Abb. N. C.* 353, *S. C.*, 2 *Dem.* 577; *Bulkley v. Staats*, 4 *Redf.* 524; *Tompkins v. Moseman*, 5 *Id.* 402). Because the claim is against the executor or administrator personally, an attorney has not a lien for compensation for professional service rendered him, upon the funds of the estate (*DeLamater v. McCaskie*, 4 *Dem.* 549).

tion arises as to the order in which the attaching creditors are entitled to payment,—whether in the order of the receipt of the attachments by the sheriff, or of the levy of them upon such property.

The statute provides that, where two or more warrants of attachment against the same defendant are delivered to the sheriff to be executed, their respective preferences are the same as where two or more executions against the property of the same defendant are delivered to the sheriff. (*Code Civ. Pro.* § 697).<sup>\*</sup> And, as to executions, it is provided that the one first delivered to the sheriff to be executed has preference, notwithstanding the levy is first made by virtue of an execution subsequently delivered to him. *Id.* 1406. Such is the rule applicable to personal property subject to levy of executions. (*Camp v Chamberlain* 5 *Denio* 198; *Peck v. Tiffany*, 2 *N. Y.* 451; *Pach v. Gilbert*, 124 *N. Y.* 612). But, as the sheriff cannot take real property into his custody, it is necessary to constitute the levy of an attachment upon it, that he file with the clerk of the county in which it is situated a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the process, and a description of the property levied upon,—the notice to be also subscribed by the plaintiff's attorney. (*Code Civ. Pro.* § 649).

The levy of an attachment is essential to make it [21] available as a lien, or to create by it security for payment of the judgment which may follow. (*Anthony v. Wood* 96 *N. Y.* 180; *Warner v. Fourth National Bank*, 115 *Id.* 251). And it is the duty of the sheriff to whom an attachment is delivered to immediately levy it upon the property, personal and real, of the defendant, sufficient to satisfy the demand, if it

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<sup>\*</sup> See also *Code Civ. Pro.* §1407.

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can be found. (*Code Civ. Pro.* § 644). He is thus required to levy them, if there be more than one, in the order in which they are received by him ; and, for his neglect to levy such process, he may be liable to the plaintiff for the consequences (*Lewis v. Douglass*, 53 *Hun.* 587).

In view of the duty imposed upon the officer in levying attachments, it was evidently contemplated by the statute that they would be levied in the order of their receipt by him, and for that reason there is no distinction in that respect made in its application to personal and real property, nor is our attention called to any case in which any such distinction is observed, since the repeal of the provisions of the Revised Statutes relating to attachments against absconding, etc., debtors. The provisions of section 697 of the Code, since then, may properly be applicable to attachments levied upon both kinds of property ; and, therefore, it would seem that, in cases where attachments are issued to the same officer, the rule of preference relating to executions levied upon personal property is applicable to attachments levied upon property real as well as personal. Under the present statute, we think such must be the rule of distribution of the proceeds of the sale of real property among the attaching creditors who proceed to judgment, and it seems alike reasonable and just.

In that view, the sale upon executions issued upon some or one of the judgments of the attaching creditors gives them no advantage over the others of them, which the lien of their attachments does not give them (*Russell v. Gibbs*, 5 *Cow.* 390 ; *Rowe v. Richardson*, 5 *Barb.* 385). Since a judgment is a lien upon the real property of a judgment debtor, no levy of execution issued upon it is made on such property. But if a levy were necessary,

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\* See also *Drake on Attachment* 3191 and cases there cited; and *Code Civ. Pro.* § 102.

and the land charged only by it, as has been—and probably yet is—the case in some of the States, the rule applicable to levy and sale upon executions of real and personal property would be substantially the same (*Catlin v. Jackson*, 8 *Johns.* 406). The execution of the lien of an attachment is contingent upon the recovery of a judgment in the action in which it is issued. Then it may be executed in the manner provided by the statute (*Code Civ. Pro.* § 1370). And, as an actual levy is necessary to create the lien of an attachment upon property, it would seem that, when several of them are levied upon the same real property of a defendant, the order of preference or priority would be the same, and founded upon the like reason, as that applicable to levy of attachments on his personal property, in the absence of any different rule upon the subject. There seems to be none. And therefore the lien of the attachments levied upon the real property of Van Camp are entitled to priority in the order in which they were delivered to the sheriff. (*Learned v. Vandenburg*, 7 *How. Pr.* 379, 8 *How. Pr.* 77; *Yale v. Demick*, 20 *How. Pr.* 430; *Yale v. Matthews*, 12 *Abb. Pr.* 379).

These views are in accord with the direction in the judgment for the distribution of the fund among the attaching creditors other than the defendant Bruner, to whom the payment before mentioned was made upon an execution irregular upon its face, and void for the purposes of collecting anything from the fund in question; and, for want of an affidavit to justify the issuance of the Bruner attachment, the levy of it was ineffectual to support a lien of it upon the property. It was determined by the trial court to be void, and so declared by the judgment.

A question is raised about the disposition of the proceeds received by the sheriff of the Van Camp accounts. As no attachment, other than that of Keeler & Salisbury, was levied upon them, it is not seen that any creditor,

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other than they, obtained any lien upon the accounts by them attached. Those upon which their attachment was levied produced only \$130.04; which amount was sufficient to pay their judgment of \$119.98, and they were entitled to its payment from the proceeds of the accounts upon which their attachment was levied. The assignment

[23] by Van Camp to Keeler & Salisbury of the proceeds of other of his accounts collected by the sheriff was not effectual to transfer to them title of such proceeds to the prejudice of the attaching creditors. When payment of the accounts was made by the debtors to the sheriff, the [24] amount so received by him became charged with the lien of the attachments in his hands, in the order of the delivery of them to him.

In view of the circumstances, the conclusion of the trial court that the sheriff is not chargeable with any greater rate or amount of interest on the fund than that realized from it was fairly justified, and such conclusion is sustained.

The defendant Orleans County National Bank, [25] having recovered a judgment against Van Camp, September 14, 1889, by default, upon the service of the summons by publication, afterwards, on November 16th, commenced against him an action upon the same claim, by the personal service upon him, in this state, of the summons and complaint, and on December 7, 1889, recovered a judgment therein by default. It does not appear that any of the parties, other than the judgment debtor, could be prejudiced by the last-mentioned judgment; and whether or not it was, by reason of the former judgment for the same cause, rendered invalid, is a question which none of the parties, other than he, could legitimately raise for consideration. He does not seek to attack it in this action. If the first judgment was effectual to charge the defendant *in personam*, the other is useless. But if, from

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any cause, it is not so, it may properly stand. Therefore, without considering the question upon the merits, the conclusion of the trial court that the judgment was void, as well as the judgment to that effect is not sustained.

Those views lead to the conclusion that the payment by the defendant Searle, as sheriff, to the defendant Bruner, of \$96.65, was made without due authority, and he was not justified in making it; that the defendants Keeler & Salisbury were entitled to priority in payment upon their judgment, of or from the proceeds, amounting to \$130.04, of the accounts upon which their attachment was levied; and that the second judgment above mentioned, of the Orleans County National Bank, is here treated as valid, and so far as, by the judgment appealed from, it is otherwise determined, it should be reversed, and in other respects affirmed.

The judgment should be thus modified without costs to any party.

DWIGHT, P. J., LEWIS and HAIGHT, JJ., concurred.

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*In re Updike.*

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IN THE MATTER OF THE PETITION OF  
HOPPER TO PUNISH UPDIKE FOR A  
CONTEMPT OF COURT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, JUNE,  
1894.

§ 14.

*Contempt—false justification of surety upon bond to discharge mechanic's lien.*

The execution of a bond to secure the discharge of a mechanic's lien and the justification by affidavit thereon of a surety therein at a time when he was insolvent, constitutes a contempt of court for which the person whose lien is thereby discharged, is entitled to redress to the extent of the injury inflicted upon him, although his attorney neglected to avail himself of the opportunity to inquire into the particulars of the surety's sufficiency.

In such a case, the inconsistency resulting from the prosecution of the proceedings to punish for contempt and of an action to set aside transfers of real property by the surety as fraudulent at one and the same time is not available as a means of exonerating the offender. The offense is one against the dignity of the Court, and it is neither the province of the party injured nor his right to compromise or condone it.

(Decided June, 1894.)

Appeal by the petitioner from an order of the special term denying a motion to punish one Edward S. Updike, Sr. for contempt of Court.

The facts are stated in the opinion.

*Carpenter & Hassett*, for petitioner, appellant.

*David McClure* and *Harry B. Weselman* for Edwin S. Updike, Sr., respondent.



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BISHOFF, J.—The petitioner, John J. Hopper, was the lienor named in a notice claiming a lien, pursuant to the provisions of the Mechanics' Lien Law (ch. 342, L. 1885), which notice was filed as by statute is for such cases made and provided. The lienees, intending to secure the discharge of the lien upon giving security, as provided by subdivision 6 of section 24 of the Mechanics' Lien Law, caused the lienor to be served with a copy of the proposed bond, and notice to the effect that the sureties would appear at a time specified, before the court, for examination with regard to their sufficiency. Relying upon the truth of the formal affidavit of sufficiency made by each of the sureties, and indorsed on the bond, to the effect that the affiant was at the time a freeholder within the State, and worth double the amount of the penalty over and above all debts and liabilities, and property exempt by law from execution, the lienor's attorney waived further examination of the sureties and approved the bond. The court thereupon also approved the bond, and by its order directed that the lien be discharged. Pursuant to the directions of the order the lien was, in fact, discharged. Subsequently the lienor recovered judgment in an action brought to foreclose the lien. The judgment remaining unpaid, the lienor next recovered judgment upon the bond against the sureties. Supplementary proceedings in aid of an execution against the property of Edwin S. Updike, Sr., one of the sureties, developed that he was then worthless. These proceedings were then instituted against Updike to punish him for his misconduct in having, by means of his wilful misrepresentation of the substance of his formal affidavit of justification, imposed upon the court, and thus induced it to direct the discharge of the lien, to the petitioner's injury. On the hearing it transpired, as stated, that the petitioner had not availed himself of the opportunity afforded for the particular examination of the sureties with regard to their sufficiency

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*In re Updike.*

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before the approval of the bond ; that the surety proceeded against actually held the record title to several pieces of real property situated in the City of New York at the time he tendered himself as such surety, and that the petitioner, prior to the institution of these proceedings, and after the surety's examination in supplementary proceedings, had brought two actions in the superior court to set aside certain conveyances, made by the surety subsequent to the signing of the bond, as fraudulent respecting the creditors of the grantor, which actions were pending and undetermined. For these reasons the learned judge at special term dismissed the proceedings.

The bond given upon the discharge of the lien was in the penalty of \$1300, and from Updike's sworn testimony as a judgment debtor, it appears that his formal affidavit of sufficiency as surety was unqualifiedly false and perjurious. He most explicitly admitted that his ownership of the several pieces of real property, excepting the premises Nos. 12 to 22 East One Hundred and Sixth street, the title to which was in him when he qualified as surety, was wholly nominal, and that he had since conveyed them as directed by the actual owners. With regard to the One Hundred and Sixth street property, he stated that his interest therein was only to the extent of one-fifth of their value over and above the cost of construction ; that the estimated cost of construction was \$159,000, the actual cost \$180,000, and their value not above the last mentioned sum. He further admitted that, at or about the time he tendered himself as surety, he was indebted to his daughter-in-law, Fannie M. Updike, in the sum of \$5000, and that his personal property at the same time did not exceed \$200. Accepting now the cost of the One Hundred and Sixth street houses at \$159,000, and their value at \$180,000. Updike's interest in the excess of value above the cost was not over \$4200. Adding to

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*In re Updike.*

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the last mentioned amount the value of his personal property, without deduction, the aggregate amount of property owned by Updike when he offered himself as surety was \$4400. Deducting from the last mentioned sum his indebtedness to his son's wife, \$5000, it is apparent that, after giving him the benefit of the most favorable construction of his testimony, Updike was actually insolvent when he persuaded the Court to accept him as a sufficient surety for \$1300, and that he swore falsely when he stated, under oath, that he was worth double that sum above all debts and liabilities, and property exempt by law from levy and sale under execution.

That the imposition so successfully practiced by Updike constitutes a contempt of Court, for which the petitioner is entitled to redress to the extent of the injury inflicted upon him, is a proposition so well supported as to be no longer debatable (*Simon v. Aldine Pub. Co.*, 12 *Civ. Pro.* 290; *Lawrence v. Harrington*, 63 *Hun.* 196; *Foley v. Stone*, 18 *Civ. Pro.*, 190; *People ex rel. Munsell v. The Court of Oyer and Terminer*, etc., 101 *N. Y.*, 245; *King v. Barnes*, 113 *N. Y.*, 476).<sup>\*</sup> Nor does the neglect of the petitioner's

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<sup>\*</sup> In *Egan v. Lynch*, 3 *Civ. Pro.* 236, Judge Truax, at special term of the superior court, held that where the sureties in an undertaking given to procure an order of arrest were insolvent and swore falsely in the affidavit of justification appended to the undertaking, they were guilty of a contempt of court, and should be fined the amount of a judgment recovered by the defendant in the action, in a suit subsequently brought to recover damages for false arrest, and should also be imprisoned for six months and until the fine was paid..

*Stephenson v. Hanson*, 6 *Civ. Pro.* 43, *Keating v. Goddard*, 8 *Id.* 377, is precisely the same effect.

In *Simon v. Aldine Pub. Co.* 12 *Civ. Pro.* 290, reversing 11 *Id.* 267 affirming 8 *St. Rep.* 334; *Nathans v. Hope*, 5 *Civ. Pro.* 401, sureties upon undertakings who were insolvent, at the time of executing such undertakings and knew themselves so to be, were held guilty of contempt and punished therefor

But in *Norwood v. Ray Manufacturing Co.*, (11 *Civ. Pro.* 273), Justice BARTLETT, at special term of the supreme court in Kings county,

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*In re Updike.*

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attorney to avail himself of the opportunity to inquire into the particulars of the surety's sufficiency assuage in any degree the latter's outrageous and criminal conduct. The fact remains that he knowingly and deliberately carried his attempted imposition upon the Court into successful execution, and by fraudulent means secured the order which deprived the petitioner of his security. That the petitioner, and his attorney, unwilling unnecessarily to tax the endurance of the Court and to delay the discharge of its duties in other respects by what seemed to them a needless examination, in good faith, and unwary of the attempted perpetration of the fraud, approved the bond, and by that means facilitated the fraud, does not palliate the offense. Nor is the apparent inconsistency of the petitioner in prosecuting these proceedings and the Superior Court actions at one and the same time available as a means of exonerating the offender. The offence was one against the dignity of the Court, which it was neither the province of the petitioner, nor his right, to compromise or condone. It is owing to the Court that the offense should not go unpun-

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held that the perjury of one who falsely justified as a surety upon an undertaking on appeal is not a contempt, and cannot be punished as such.

In *Diamond v. Knoepfel*, 3 *St. Rep.* 291, a worthless surety upon an undertaking on appeal, who had justified as such, and falsely testified that his total indebtedness did not exceed \$300, whereas, in fact, it amounted to more than \$1000, was held guilty of a contempt and fined the amount of the judgment affirmed on the appeal.

In *Lawrence v. Harrington*, 63 *Hun.* 195, it was held that sureties on an undertaking on appeal who falsely justified, might be punished therefor as for contempt, although they had not been convicted of perjury.

In *Foley v. Stone*, 18 *Civ. Pro.* 190 the party and his attorney who imposed upon the court an undertaking with irresponsible sureties were both held guilty of contempt and punished therefor.

In *Hull v. L'Eplattenier*, 15 *Daly*, 534, modifying 49 *How. Pr.* 500, it was held that the court could punish for contempt a person not a party to an action, who conspired with a party to it, to impose upon it a worthless surety on appeal.

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Jacobs v. Zeltner.

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ished, if for no other reason than to deter others from the commission of like acts. If the actions brought to set aside the alleged fraudulent conveyances had been prosecuted to success, that fact might have afforded a refutation of the present charge. We are not permitted to indulge a presumption that the conveyances were fraudulently made. As it is, the offense is not only not denied but substantially conceded. If reparation for the injury inflicted upon the petitioner by the loss of his security had been made, in whole or in part, that fact would have been entitled to consideration in determining the measure of the redress to be awarded to the petitioner and be exacted of the offender by way of punishment to be imposed.

The order of the Special Term is reversed, with costs, and the prayer of the petitioner is granted, with costs. Edwin S. Updike, Sr., is adjudged guilty of a contempt of court, and fined in the amount of the judgment recovered against him, with the costs and expenses of the supplementary proceedings, of these proceedings, and the costs of the appeal, besides \$100 for the fees of the petitioner's attorney. The order hereon must be settled on notice.

BOOKSTAVEN, P. J., and BISCHOFF, J., concurred.

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JACOBS, LANDLORD, RESPONDENT, v. ZELTNER, TEN-  
ANT'S APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,  
JUNE, 1894.

§§ 2240, 3044 *et seq.* 3213.

*Summary Proceedings—power of justice to open default—review of determination on motion to open default.*

▲ final order made in a district court in the city of New York, in summary proceedings to recover possession of real property although obtained by default is appealable to the general term of

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the court of common pleas. Final orders in such proceedings are in nature assimilated to judgments, for the purpose of review, and since a final judgment rendered upon default is appealable notwithstanding the power conferred upon justices to open defaults upon motion such final orders are also appealable.

A justice of a district court in the city of New York has power upon motion to open a default taken in summary proceedings, but an appeal does not lie from the order made by him upon such determination.

The power to review proceedings of district courts in the city of New York being purely statutory, an appeal does not lie from a determination thereof where no provision therefor is made by statute.

An appeal from a final order in summary proceedings suffices to present the question as to the services of the precept for review where the service has been attacked by a motion to open a default taken in such proceedings, and the matter is to be determined upon the affidavits used on such motion.

Where in summary proceedings a marshal certifies that the precept was served by leaving it with a person of suitable age residing upon the premises in question, the defendant being then absent therefrom, affidavits by the tenant, his wife and two children, to the effect that the precept was not served on any one of them, are insufficient to rebut the presumption arising from the marshal's certificate of service, as it might be true, notwithstanding the facts alleged in the affidavits.

To sustain a motion to open a default taken in summary proceedings, made on the ground that the precept was not served, the tenant must show a defense to the proceedings.

(Decided June, 1894.)

Appeal by the tenant from a final order of the district court in the City of New York, for the 4th Judicial District, in summary proceedings awarding to the landlord the possession of certain real property and from an order denying the tenant's motion to open his default in such proceedings.

The facts are stated in the opinion.

*Steifel & Lauer*, for tenant, appellant.

*Joseph Stiner*, for landlord, respondent.

BISCHOFF, J.—Judgment for dispossession of the appellant from that certain portion of the premises in question, which he held by lease was rendered by default of his appearance, and the warrant was duly executed.

The proceedings were based upon the certificate of a marshal to the effect that the precept had been served upon defendant by delivering the same to and leaving it with a person of suitable age residing upon the premises, defendant being at the time absent therefrom. Appellant subsequently made motion before the Justice to open his default, upon the ground that he was never apprised of the issuance of process, and in support of this motion affidavits were presented, which are annexed to the return upon this appeal, verified respectively by appellant, his wife and their two children, it appearing therefrom that the precept was not served upon any one of the affiants.

The Justice denied the motion expressly upon the ground that he possessed no power to open the default, and from the order thereupon entered it appears that no examination into the merits of the application was made. This appeal was taken from such order and from the final order for dispossession.

A judgment rendered upon default of appearance in a District Court is appealable to this Court, notwithstanding the power conferred upon the Justices to open defaults on motion (*Hurry v. Coffin*, 2 *Civ. Pro.* 319); and in view of the provisions of section 2260 of the Code, whereby final orders in summary proceedings are in nature assimilated to judgments for purposes of review (*Moench v. Yung*, 16 *Daly*, 143), the case first cited is an authority for the proposition that such a final order, when obtained by default, is none the less appealable.

It would appear that the Justice misapprehended the extent of his powers in this case, for the motion to open the default as here made, clearly called for determination

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in the exercise of that discretion which was vested in him by section 1367 of the Consolidation act, yet from the order denying such motion no appeal lies. The statutory provisions governing appeals from the district courts are found in sections 3044 to 3067 of the code, (see Consolidation act, ch. 410. Laws 1882: § 1438, *Code Civ. Pro.* 3213), and no provision for an appeal from an order granting or denying a motion to open a default is there made. In the absence of such a provision the appeal cannot be entertained, the power to review proceedings of these courts being purely statutory, (see *Rosenthal v. Greene*, 12 *Daly*, 529).

The appeal from the final order, however, suffices to present the question raised by appellant in the court below (*Code Civ. Pro.* § 3064; *Hurry v. Coffin*, *supra*), and the matter is to be determined upon the affidavits incorporated in the return. We are constrained to hold these affidavits are insufficient for the purpose intended, and cannot avail against marshal's certificate essential to the validity of the order made (*Code Civ. Pro.* § 2240). For all that is alleged in these affidavits as matter of fact, the service may well have been made as certified to by the marshal, and the presumption of regularity which attaches in support of the judgment cannot be here deemed to have been successfully rebutted. This is not as was *Waring v. McKinley* (62 *Barb.*, 612), a case where a direct return of personal service was made and successfully impeached, and, furthermore, the appellant here fails to present any defense to the proceeding, which omission this Court has held to be fatal to an appeal of this character (*Jewell v. Heintzel*, 6 *Daly*, 411).\*

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\* In *Jewell v. Heintzel*, (6 *Daly* 411,) it was held under section, 366 of the Code of Procedure, the provisions of which corresponded to those of section 3064 of the present Code, that one appealing under said section from a judgment of a Justice's Court, taken by default, must



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The final order must be affirmed, with costs. Appeal from order denying defenant's motion dismissed, without costs.

BOOKSTAVEN, P.J., concurs.

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SMITH, RESPONDENT, v. BARNES, *et al*, APPELLANT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL  
TERM, JUNE, 1894.

§ 55.

*Attorney and Client—stipulation by attorney when binds client.*

Parties may by their stipulation in many ways make law for any legal proceeding to which they are parties, and which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate that the decisions of a court may be final, and thus waive the right of an appeal, and by such stipulations, not unreasonable against good morals or sound public policy, have been and will be enforced, and, generally, all stipulations made by parties for the government of their conduct or control of their rights, in the

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swear to his defence, and if it is denied by the respondent must corroborate it; that a mere affidavit of merits will not suffice.

It has also been held under that statute that facts must be stated which would enable the court to say that injustice had been done, and that mere conclusions were not sufficient. *Armstrong v. Craig*, (18 Barb. 387); *Fowler v. Colyer*, (2 Ed. Smith 125); *Same v. Morrison*, (1 Sheld. 382).

In *Bates v. Gorman*, decided under the present Code, a similar determination was made.

In *Waring v. McKinley*, (62 Barb. 612), it was held that where the default was sought to be set aside because of a defect in or want of service of the summons the relief must be granted, and if that error was established, and that it was not necessary to affirmatively show that there was a valid defence or that manifest injustice had in any other respect been done.

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trial of a cause or the conducting of a litigation, are enforced by the courts. Accordingly, *held*,—that a stipulation by the parties to an action that the decisions of a referee upon the trial of an issue should be final and not reviewed, either by a motion for a new trial or appeal, must be enforced.

The attorneys for the parties to an action may bind their clients in all matters of procedure by stipulation, and a stipulation by an attorney, although made without his client's knowledge, that the decisions of a referee upon the trial of an action shall be final and shall not be reviewed is within the scope of his authority, and should be enforced.

(Decided June, 1894.)

Appeal from an order of the special term of this court, denying a motion for a new trial upon newly discovered evidence.

These facts are stated in the opinion.

*Horatio C. King*, for defendant, appellant.

*John H. Cohn* (*David Levintritt*, attorney), for plaintiff, respondent.

GILDERSLEEVE, J.—This action to recover commissions earned by the plaintiff's assignor, in the capacity of selling agent for the defendants, after being at issue nearly three years, was under a stipulation, sent to a referee to hear and determine.

The stipulation is as follows: "The issue in the above entitled action having been set down for trial this 16th day of October, 1893, and the case having been called and marked ready, it is hereby stipulated and agreed by and between the parties to this action and their respective attorneys that the issues in the above entitled action be and the same hereby are referred for determination to the Hon. William S. Kieley, as referee, the said reference to proceed without delay, and to continue there-

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after, without unreasonable adjournment, as hereinafter specified. And it is further stipulated and agreed that neither party hereto will appeal from the judgment to be entered on the report of the referee, or make any motion in arrest or stay of the said judgment, or of the execution to be issued thereon, or appeal from any order denying any motion that may be made by the defeated or aggrieved party for a new trial, the object of this stipulation being to bring this litigation to a speedy and final determination.

“Dated New York, October 16th, 1893.

“A—— B——, Attorney for Plaintiff.

“C—— D——, Attorney for Defendants.”

The trial proceeded before the referee about as usual in such cases, and in a reasonable time the case was submitted, the report of the referee filed, and judgment duly entered in favor of the plaintiff. The defendants, by an order to show cause, moved at Special Term to set aside the stipulation, and for a new trial on the ground of newly discovered evidence, or for an opening of the reference and a rehearing. This appeal is from the order of the Special Term denying the requests.

The main argument of the learned counsel for the appellants is an attack upon the stipulation.

Defendant Barnes swears that the stipulation was made without the knowledge or consent of either of the defendants.

It is urged by appellants that the stipulation deprives the defendants of a substantial right, to wit: the right of appeal, and for this reason cannot be entered into by an attorney without the prior consent of his clients.

It must be observed that the time to appeal elapsed before the motions under consideration were made. Should the stipulation be set aside, it is beyond the power of the Court to restore the right to appeal.

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Parties, by their stipulations, may in many ways make law for any legal proceeding to which they are parties, which not only binds them, but which the court are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced, and generally all stipulations made by the parties for the government of their conduct, or the control of their rights in the trial of a cause, or the conduct of a litigation are enforced by the Courts (In the matter of the N. Y. Lackawanna R.R. Co., 93 N. Y., 447). See also *People v. Stevens*, 52 N. Y., 310; *Townsend v. Materson Stone Dressing Co.*, 15 N. Y., 587; *Hong Kong & Shanghai Banking Corporation v. Cooper*, 114 N. Y., 388; *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y., 7; *Staples v. Parker*, 41 Barb., 648; *Cox v. N. Y. C. & H. R. R. Co.*, 63 N. Y., 414; *McGuire v. Id.*, 6 Daly, 70; *Ballou v. Parsons*, 55 N. Y., 673.

Even assuming that the stipulation was made without the knowledge or consent of either of the defendants, we are inclined to think that the attorneys had power to enter into the stipulation without special authority, and that the defendants are bound by the act of their attorney. It is a general rule that proceedings regularly had by attorneys, lawfully appearing for the respective parties, cannot, in the absence of fraud, be questioned by their clients, because of the want of specific authority to do the acts done or consented to by them (*Palen v. Starr*, 7 Hun., 432).

The stipulation was proposed by the defendants' attorney, and by it the defendants secured the benefit of an adjournment, the waiver of a jury trial and the appointment of a referee named by them. As a condition of granting the favor, both parties, by their attorneys, united

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in a stipulation not to appeal. The plaintiff was justified in assuming the authority of the defendants' attorney to make the stipulation, and in consideration thereof waived a default and an inquest.

The Court of Appeals, in *Cox v. N. Y. C. & H. R. R. Co.* (63 *N. Y.*, 414) held that the attorney for a defendant might stipulate that the action should not abate on the death of the plaintiff, in order to secure an adjournment of the trial, without special authority from the defendant. The Court said: "It pertains to the procedure in the action and it is a just implication that the authority of the attorney extends to the management of the cause in all the exigencies which arise during the progress. The attorney cannot compromise the claim of his client, or release the cause of action, or satisfy a judgment in his client's favor without payment, in the absence of special authority. There is no implication of an authority to do acts of this character from his appointment as attorney in the case; and a party dealing with him is bound to take notice that they are not within scope of his authority. But in matters relating to the conduct of the cause, his authority is very broad" (*Denton v. Noyes*, 6 *John.* 295; *Gaillard v. Southland*, 3 *Hill*, 552; *Gainsford v. Brausner*, 2 *Camp.*, 9).\*

But, aside from this consideration, we are of the opinion that the evidence fairly shows that the stipulation was

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\* See *Herbert v. Lawrence* 21 *Civ. Pro.* 337, and cases there cited also *Marks v. City of Buffalo* 87 *N. Y.* 187 where the power of an attorney to stipulate for his client is very fully considered.

"An attorney at law has authority by virtue of his employment as such to do on behalf of his client any act in or out of court necessary or incidental to the prosecution or management of the suit which affect the remedy only and not the cause of action." 1 *Amer. and Eng. Enc. of Law*, 954, §7.

See also *Ross v. Ferris*, 18 *Hus.* 210.

In *People v. Mayer*, 11 *Abb. Pr.* 66, (*quid vide* and cases there cited) a stipulation not to appeal was held to be beyond the attorney's power.

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**Smith v. Barnes.**

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fully assented to, in the course of its execution, by the defendants, and they ratified it, and are estopped from questioning its binding force.

Since we reach this conclusion that the stipulation must stand, the appeal from so much of the order as denies the motion for a new trial must be dismissed. The terms of the stipulations preclude the appeal.

The motion for a new trial on the ground of newly discovered evidence is without merit.

The most that can be said on this branch of the case is that the appellants' insistence that their own counsel did not present their case fully and with the ability the situation demanded, should not be permitted to work a disadvantage to the plaintiff and cause him to surrender rights lawfully acquired under the stipulation.

This grievance the defendants must settle with their former counsel, who conducted the trial. No fraud or collusion is charged. The stipulation was fully executed and performed. No sufficient reason appears for setting aside or interfering with the proceedings had, and the defendants, though disappointed, should accept the result and pay the judgment.

Order affirmed, with costs and disbursements.

FREEDMAN, P. J., concurred.

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Guliano v. Whitenack.

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## GULIANO v. WHITENACK.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
SEPTEMBER, 1894.

## § 66.

*Attorney's lien—when satisfaction of judgment set aside to because of—  
assignment of judgment.\**

Where a client suffers a case to go to judgment thereafter assigned the judgment, and his assignee satisfies it, the assignee cannot successfully assert in opposition to a motion by the attorney for the plaintiff to set aside the satisfaction on the ground that it is in fraud of his lien for compensation and costs, and that the action was prosecuted without authority and against the will of the plaintiff.

An assignee of a judgment takes subject to equities and acquires no better right than his assignor, and therefore as well as because of the attorney's lien given by section 66 of the Code of Civil Procedure, an attorney is not barred of relief to enforce such lien even by a transfer of the judgment for value without notice and a *bona fide* satisfaction of the judgment.

Where in a case for personal injuries judgment was recovered for \$250 damages and \$174.76 costs, and the plaintiff assigned the judgment and his assignee satisfied it,—*Held*, that the satisfaction must be vacated and the attorney's lien of which notice had been given the defendant in the action enforced to the extent of the attorney's rightful claim; that the attorney was entitled to the costs of the action by legal right, and the amount of his fee in this action was fixed by express agreement with his client.

In such a case, to ascertain on a motion to set aside the satisfaction, the extent of the attorney's lien is not an arbitrary determination, but an adjudication upon evidence in an appropriate proceeding.  
(Decided September, 1894)

Motion by the plaintiff's attorney that a satisfaction of judgment herein be set aside to the extent of the attorney's lien for costs and compensation.

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\* See Note on Effect of Certain Assignments on Attorney's Lien, 22 Cts. Pro. 279.

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Gullano v. Whitenack.

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The facts are stated in the opinion.

*J. Wamsley*, for motion.

*Smith & Dougherty*, in opposition.

PRYOR J.—In action for personal injury, the plaintiff had judgment for damages and costs; an assignee of the judgment has given a formal satisfaction of it; and now plaintiff's attorney moves to set aside the satisfaction, on the ground that it is in fraud of his lien.

By contract with the client the attorney was to receive, in compensation of his services, one-third of the damages recovered. Notice of the agreement was communicated to the defendant with the service of the summons. The judgment is for \$250 damages and \$174.76 costs. The attorney has been paid no part of his fee or costs; and it is conceded that the client is irresponsible.

The assignee resists the application to vacate the satisfaction on the ground, among others, that the prosecution of the action was without the authority, and, indeed, against the will of the plaintiff. I do not so find the fact. But, in any event, the client suffered the case to go to judgment without challenging the authority of the attorney; and it is now too late to impeach the judgment for that infirmity. Moreover, the assignee claims to be owner of the judgment for value; and the defendant asserts that he has given value for its satisfaction; how then can either be heard to say that it is invalid? Any question as to its validity is beside the scope of the present controversy (*Whitaker v. R.R. Co.*, 28 *Abb.*, *N. C.*, 11, 18), which is, whether the satisfaction shall prevail against the attorney's lien.

From the principle that an assignee of a judgment takes subject to equities, and acquires no better right than has his assignor (*Gates v. De La Mare*, 20 *N. Y. Supp.*



837), and from the express provision of the Code (§ 66), that an attorney's lien attaches to the judgment "in whosoever hands," it results that the attorney is not barred of relief even by a transfer for value without notice and a *bona fide* satisfaction of the judgment.\*

I do not concede, however, that the assignment by the plaintiff, the employee of defendant, to the defendant's son was in good faith; on the contrary, I conclude, from the facts before me, that the assignment and the satisfaction both were made with knowledge of the attorney's lien and conclusively with intent to defraud him of his compensation.

It follows, therefore, that the satisfaction must be vacated and the attorney's lien enforced to the extent of his rightful claim (*Baily v. Murphy*, 136 *N. Y.*, 50; *Pool v. Belcha*, 131 *N. Y.*, 200; *Ward v. Wardsworth*, 1 *E. D. Smith*, 298). That claim is not in controversy. The attorney is entitled to the costs by legal right (*Marshall v. Meech*, 51 *N. Y.*, 140; *Matter of Bailey*, 31 *Hun*, 608; *People v. Common Council*, 7 *Misc.*, 386; *Adams v. Stillman*, 4 *Misc.*, 259); and here the amount of his fee is fixed, by express agreement with the client, at a fair and equitable sum. To ascertain in this motion the extent of the attorney's lien is not an arbitrary determination, within the ruling in *Bailey v. Murphy* (136 *N. Y.*, 50), but is an adjudication upon evidence in an appropriate proceeding (*Whittaker v. R. R. Co.*, 18 *Abb. N. C.*, 11).

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\* An assignment of the cause of action pending suit is subject to the attorneys lien, and where the action is continued to judgment the lien attaches thereto (*Schwartz v. Jenney*, 21 *Hun.*, 33; *Merchant v. Sessions*, 5 *Civ. Pro.*, 24; *Ward v. Craig*, 87 *N. Y.* 549), even where, after the substitution, the action is continued by another attorney. (*Creighton v. Ingersoll*, 20 *Barb.*, 541).

One taking an assignment of a judgment takes it subject to the attorney's lien, and cannot be heard to attack the judgment as collusive (*Marvin v. Marvin*, 22 *Civ. Pro.*, 274).

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Will of Phillip Morganstern

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Let an order be entered vacating and setting aside the satisfaction of judgment to the extent of the attorney's just demand, namely \$258.09, the aggregate sum of his costs and interest in the damages, with \$10 costs of motion.

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*In re* WILL OF PHILLIP MORGANSTERN.

SURROGATE'S COURT, WESTCHESTER COUNTY, JUNE, 1894.

§ 2624.

*Jurisdiction of Surrogate—construction of will.*

A surrogate's court has not jurisdiction to construe a disposition of real property made by a will, and where upon an application for the construction of a disposition of property made by a will, it appears that the provisions respecting both real and personal property are so inseparably connected and blended as to preclude a construction as to one species of property without involving the other, the application for a construction will be denied.

(Decided June, 1894.)

Motion for a construction of a will of the decedent above named.

The facts are stated in the opinion.

*J. N. Goldbacher*, for the executors

*Farrington M. Thompson*, for special guardian of minor children.

COFFIN, S. The facts that only three children were in existence at the making of the will, and that three were born subsequently, are conceded. It is therefore claimed by the special guardian that under the provisions of 2 Rev.

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Will of Phillip Morganstern.-

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*St.* p. 65, § 49, as amended by *Laws* 1869, Ch. 22, the father died intestate as to these after born children. It is well settled that a testamentary disposition to a class includes every person answering the description at the testator's death. That is construed by the courts to be the testator's intention, and they are thus deemed to be mentioned. So, where a class is referred to, whether there is anything devised or bequeathed to them or not, all answering the description must be deemed to be mentioned. It is not considered necessary, however, to elaborate this point, as it will presently appear that this court has no jurisdiction to determine it in this case.

Section 2624 of the Code authorizes the surrogate, where a party expressly puts in issue the validity, construction, or effect of any disposition of personal property contained in a will, to determine the question. He is not here required to determine an issue as to any clause of the will disposing of personal property solely, which he might do, but of one embracing both real and personal, and so inseparably connected and blended as to prevent a construction as to one species of property without involving the other. As the power to construe a will on the probate is one lately conferred upon the surrogate by statute and is so far an enlargement of his jurisdiction, he cannot be permitted to go beyond it, and attempt to exercise a larger power than was intended to be conferred by the legislature. *In re Shrader*, 63 *Hun*, 36.

The request to construe is therefore refused. Ordered accordingly.

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Crouch v. Hoyt.

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CROUCH vs. HOYT.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL  
TERM, SEPTEMBER, 894.

§ 66.

*Attorney's lien—when prevents discharge from arrest.*

Where in an action to recover damages for the alienation by the defendant of the affections of the plaintiff's wife, the defendant has been arrested and thereafter the plaintiff executed a general release to the defendant, and consented to his discharge from imprisonment, —*Held*, that the attorney for the plaintiff had a lien of the cause action for his compensation which prevents the discharge of the defendant from imprisonment without his consent or satisfaction of the lien.

An attorney's lien for compensation extends to professional remedies or securities given in the action after its commencement.

(*Decided September, 1894*)

Motion by the defendant for his discharge from imprisonment.

This action was brought by Leslie H. Crouch to recover \$20,000 damages from the defendant for the alienation of the affections of the plaintiff's wife, Mary S. Crouch. An order of arrest was granted in the action and the defendant arrested and imprisoned thereunder in Ludlow Street jail. Thereafter the plaintiff executed to the defendant a general release and consented to his discharge from imprisonment, but his attorney refused to consent thereto, and thereupon application was made to the court for an order directing the defendant's discharge. The plaintiff's attorney opposed this application, and presented affidavit stating that the defendant's attorney had been paid in full for his services, and that the services of the plaintiff's

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Crouch v Hoyt

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attorney were worth \$250 and that he had not received anything.

*R. J. Halle*, for defendant and motion.

*Josiah T. Lovejoy*, in opposition.

MCADAM, J. — The defendant was incarcerated August 23d, 1894, under an order of arrest granted by Judge Freedman. Since then the plaintiff has relented, executed a general release to the defendant, and consented to his discharge from imprisonment. Josiah T. Lovejoy, the attorney of the plaintiff, objects to the defendant's discharge, on the ground that his fees in the action, amounting to \$250, have not been paid.

Section 66 of the Code give the attorney who appears for a party a lien upon his client's cause of action, which cannot be affected by any settlement between the litigants. This lien extends to all provisional remedies or securities given in the action after its commencement.\*

Therefore, there can be no valid discharge of the defendant, who is totally impecunious, until the attorney who incarcerated him sees fit to consent, and this counsel absolutely refuses to do. This is a sad case, but the Court can extend no aid.

Motion to discharge denied.

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\* See *Kipp v. Rapp*, (7 Civ. Pro. 385), where it was held that the attorney's lien attached to an undertaking given on appeal and that the attorney might sue thereon notwithstanding his client had assigned the judgment.

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People's Bank v. Thompson.

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PEOPLE'S BANK v. THOMPSON, *et al.*

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,  
SPECIAL TERM, SEPTEMBER, 1894.

§ 66.

*Attorney's lien.—when does not attach—when does not prevent substitution of attorneys.*

Where a firm of attorneys F. B. had served a notice of appearance for a defendant in an action, such defendant sought to substitute other attorneys in their stead, and the application was opposed on the ground that the said defendant was indebted to a former firm of attorneys, doing business under the same name of F. B. and of which the members of the present firm of F. B. were members, and it appeared that such indebtedness was for services rendered in other actions, and that the only paper served in this action was a summons, complaint and notice of appearance. —*Held*, that the motion should be granted upon the payment of such sum as may have been earned by the drawing and serving of notice of appearance.

(Decided September 18, 1894.)

Motion by the defendant that Hays & Greenbaum be substituted as his attorneys in this action in the place and stead of Fromme Bros.

The facts appear in the opinion.

*Hays & Greenbaum*, for defendant, and motion.

*Fromme Bros.*, opposed.

LAWRENCE, J.—In this case the defendant Thompson desires to substitute Messrs. Hays & Greenbaum for Messrs. Fromme Brothers as her attorneys, to defend this action.

It does not appear that anything further has been done on the part of Messrs. Fromme Brothers than the service

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*People's Bank v. Thompson.*

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of a notice of appearance for the defendant Thompson. It does appear, however, that there have been differences of opinion between the members of the firm of Fromm's Brothers which have led to the dissolution of the firm. One of the former partners has retired from the firm, and a new co-partnership formed under the old name. It is quite evident that the differences which led to the dissolution of the firm have engendered hostile feelings between the members of the late firm.

It is claimed that the defendant Thompson owes the late firm for past services a large amount of money. Those services seem, however, to have been rendered in other actions, and as the only papers served in this action are a summons and a notice of appearance; the right to oppose the substitution moved for on the ground of a general lien for such services is not clear.

I think that this motion should be granted, upon payment of such sum as the new firm may have earned in drawing and serving the notice of appearance (See *Matter of Wilson & Greig*, 2 *Civ. Pro.* 133). Settle order on one day's notice.

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LONG, *et al*, RESPONDENTS *v.* ROGERS, *et al*, IMPEADED,  
ETC., APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,  
JULY, 1894.

§ 2648, 2653a.

*Probate of will - when and how may be attacked.*

The enactment of section 2653a, of the Code of Procedure in 1892, providing for the bringing of an action to determine the validity of a will, did not repeal or in any manner effect the operation of those provisions of the Code, which make the probate of a will

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*Long v. Rogers.*

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conclusive as to personal property and as to all mankind where an application to revoke a probate is not made within one year, but is designed to furnish a means of quieting the titles to real property.

An action cannot be maintained to determine the validity of a will under section 2653 a of the Code of Civil Procedure where the will relates solely to personal property, and more than one year has elapsed since it was admitted to probate.

In such a case, an injunction restraining the prosecution of proceedings for an accounting by the executor named in the will is probably vacated.

*(Decided July, 1894.)*

Appeal by defendants from an order of the special term in New York County continuing a temporary injunction.

A decree was entered on January 14th, 1893, in the Surrogate's Court in New York County, admitting to probate a will of George W. Long as a will of personal property and granting letters testamentary thereon to the defendant Seymour. No proceeding for revocation of probate in the Surrogate's Court was instituted.

On February 2d, 1894, more than a year having elapsed since the entry of the decree of probate, the executor applied to the surrogate's court for the judicial settlement of his accounts and a citation was issued accordingly. Pending the accounting proceeding, and on April 5th, 1894, certain of testator's next of kin, who were specific legatees under the will and who had been parties to the probate proceeding in the surrogate's court, brought this action in the supreme court, under section 2653a of the Code of Civil Procedure, for the purpose of revoking the probate of the will, and obtained from one of the justices of the supreme court an injunction order restraining the executor pending the supreme court action, from the further prosecution of his accounting in the surrogate's court.

An order was made continuing that injunction and from it this appeal was taken.



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Long v. Rogers.

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*Henry M. Ward (Booraem, Hamilton, Beckett & Ramson, attorneys)* for defendants, appellants.

*H. H. Whitman (Ewing, Whitman & Earing, attorneys),* for plaintiffs, respondents.

**BARRETT, J.**—The precise question here is whether, under section 2653a of the Code of Civil Procedure enacted in 1892 (ch. 591), the next of kin of a testator can maintain an action in this Court, after the expiration of one year from probate of the will, to have the invalidity of such probate determined. The injunction which was granted at special term, restrained Mr. Seymour, as executor of the deceased Long, from proceeding in the surrogate's court with the judicial settlement of his accounts. These accounts have reference solely to the personality. If, therefore, the probate of the will as a will of personal estate was conclusive upon the plaintiff's after the lapse of one year, the executor was properly accounting when the injunction was granted.

The question then is, did the Legislature, in adding this new section, 2653a, to the article of the Code entitled "Revocation of Probate," intend to repeal the rest of the article, or at least to do away with all existing provisions as to the effect of probate after the lapse of one year? If it did not, then, clearly, the probate here was conclusive. For "a person interested in the estate" must apply for revocation within one year after the recording of the decree admitting the will to probate (*Code Civ. Pro.* § 2648). If such application is not made within one year, then as to personal property the probate concludes "all mankind" (*Hoyt v. Hoyt*, 112 *N. Y.*, 505.)

As to the the legislative intent we think there can be no doubt. It was to afford relief where relief was needed—namely, with regard to real estate; not to uproot a

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system of long standing and wholesome operation with regard to personality. The object was to expedite, not to protract, the settlement of estates. The mischief aimed at was plainly the inability under existing law to quiet titles to real estate. There was no trouble about personality. As to that, an estate could always be settled within a reasonable time after the expiration of the year. What was wanted was some way of making the probate conclusive as to realty within a reasonable time. And for this the new section provided.

In *Anderson v. Anderson* (112 N. Y., 104) it was held that a devisee of the real estate, in possession of the property devised, could not maintain an action to establish the will against the heirs at law. The heirs could choose their own time to bring ejectment, and one by one, at varying epochs, could question the will. It was to remedy this evil, to enable persons interested in sustaining a will as to real estate to gather all possible contestants into one forum; and in effect, to "conclude all mankind" that the section in questions was added. That section, it will be observed, was not enacted as an independent law, but was engrafted upon the Code—following the sections regarding the "revocation of probate." These sections were not repealed in express terms. On the contrary, though before the Legislature, they were suffered to remain. This is apparent from the title of the act, which reads: "An act to amend article second, title three, of chapter eighteen of the Code of Civil Procedure by adding thereto a new section to be known as section 2653a" (Laws of 1892, vol. 1, p. 1136, ch. 591).

It is clear, therefore, that the intention was, in adding this section, to embrace it within the existing system, not to substitute it therefor. And there is no inconsistency or irreconcilable repugnancy between the two systems, when the mischief aimed at is advisedly considered. As to

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personalty, the function of the existing statutes continues, and the effect of probate after lapse of a year remains unaltered. This function does not conflict with the function of the new section, which operates upon real estate, and which affords a practical method of making that conclusive which otherwise would remain indefinitely presumptive.

There is nothing in the phraseology of the new section which militates against this construction. It is true that we find these words therein: "It shall be tried by a jury, and the verdict thereon shall be conclusive as to real *or personal property*," etc. But this does not say that "a person interested in the estate of the decendant" shall not be otherwise concluded. Nor does it limit the effect of his failure to apply for revocation, under sections 2647 and 2648, within the year. It may entitle "a person *interested in the will*"—which is the phrase used in the new section to indicate the person who may proceed thereunder—as distinguished from "a person *interested in the estate*" (which is the phrase used in section 2347) to bring the action to validate the will, even during the running of the year. But it certainly does not authorize a person who has omitted to apply for revocation within the year, and as against whom the probate has become conclusive, to inaugurate a fresh contest thereafter.

We think the executor here was properly proceeding with his judicial accounting under the statute when this suit was instituted, and that he should not have been interfered with.

The order appealed from should, therefore, be reversed with \$10 costs and disbursements: and the injunction dissolved, with \$10 costs.

VAN BRUNT, P. J., concurred.

FOLLETT, J.—Under section 2653a I think an action can be maintained to set aside or to establish the probate of a will. Otherwise, I concur.

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Estate of Havens.

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## ESTATE OF HORACE HAVENS, DECEASED.

SURROGATE'S COURT, ST. LAWRENCE COUNTY, MAY, 1894.

§§ 2472, 2481, 2743.

*Surrogate's Court—power to construe will and determine validity of alleged assignment of legacy—accounting.*

A surrogate's court has power upon a final accounting of an executor to construe a will and determine whether a certain person is sole residuary legatee thereunder [3].

*In re Young* (92 N. Y. 235) [1]; *In re Verplanck* (91 Id. 439) [2]; *Garlock v. Vandevort* (128 N. Y. 374) [2], followed.

A surrogate's court has power to determine a question of law as to the validity of an agreement for the disposition of a legacy, made between the legatee and an heir at law [4].

Upon an accounting of an executor where a legatee claims the whole amount of a legacy and another person claims to be an assignee of the same or a portion thereof the Surrogate's Court has power to determine the controversy between them [4, 16].

*It seems* that a Surrogate's Court as a general rule has not jurisdiction to try and determine the validity of a disputed claim against an estate [5].

*It seems* that a surrogate's court has not jurisdiction to try the validity of a claim against an estate in a proceeding to compel its payment but upon the filing of a verified answer disputing the claim must dismiss the proceeding; but that in a proceeding for the sale of real property, such court may determine disputes as to claims against the estate even though the executor or administrator has rejected them [6].

The question of the jurisdiction of a surrogate's court in any proceeding must be determined by the statutory provision relating thereto [7].

A surrogate's court has full equitable jurisdiction in all matters relating to the affairs of the decedents, except so far as that jurisdiction may be limited by the provisions of the statute, relating to the special proceedings in which the question of jurisdiction may arise [8].

A surrogate's court has full jurisdiction to try and determine upon a final accounting all questions raised as to the ownership of a legacy or distributive share [7, 14].

*Decker v. Morton* (1 Redf. 477) [10]; *Estate of Heelas* (5 Id. 440) [11]; *In re Brown* (3 Civ. Pro. 39) [12], not followed. *Dubois v. Brown*.

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(1 *Dem.*, 317) [9]; *Estate of McCabe* (18 *N. Y. Supp.* 715) [13]; *Estate of Orser* (4 *Civ. Pro.* 139), [14]; *Riggs v. Cragg* (8 *N. Y.* 479) [15]; (*In re Verplanck* (91 *N. Y.* 439) [16], followed. (Decided May, 1894.)

Hearing of objections upon the judicial settlement of the accounts of Alonzo Havens and another as Executors of the last Will and Testament of Horace Havens, deceased.

The facts are stated in the opinion.

*Isaac L. Wells*, for executors.

*R. E. Waterman* for Samuel W. Havens.

VANCE, S.—In this matter the executors of the last will and testament of the deceased have petitioned for a judicial settlement of their accounts.

All parties interested in the estate have been cited; and Samuel W. Havens, one of the children of the deceased, has appeared.

The executors have filed their account, show a balance of \$5391.59 in their hands, subject only to the commissions of the executors, and the expense of this accounting. No objection has been made to any item of the account, as filed.

The correctness of the balance in the hands of the executors is conceded.

The executors, in their account, allege that under the provisions of the will, and codicils thereto, of the deceased, Alonzo Havens is entitled to the whole surplus now in their hands. This claim on the part of the executors is denied by Samuel W. Havens, who claims that under the provisions of the will, and codicils thereto, of the deceased, he is entitled to one half of the net surplus of the estate. He also alleges, in substance, that, by an agreement heretofore made by and between himself and Alonzo

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Havens, it was, for a valuable consideration, agreed that the said Samuel W. Havens should have one equal half of the surplus. The alleged agreement, it is stated, arose out of a contest concerning the probate of the will.

The records of this court show that the will of the deceased was contested before my predecessor in office, and after such contest, admitted to probate. Samuel W. Havens now alleges that, while such contest was pending, Alonzo Havens agreed with him that if he would not be a party to the contest, but would join with said Alonzo, and endeavor to sustain said will, in consideration thereof he should receive an equal share of the surplus of the estate with said Alonzo, which said Samuel W. agreed to do, and that said Samuel faithfully and carefully carried out said agreement.

It is intimated that the questions thus arising deprive this court of jurisdiction. I would gladly be relieved from the labor and responsibility of the trial and decision of the questions thus raised ; yet, whatever may be the personal consequences, I must examine and determine the question of jurisdiction under the statutes, as I understand them.

The objections filed by Samuel W. Havens raise two questions,—one of law, and the other a mixed question of law and fact. The first subdivision of such objections, taken with the allegations of the executors in the account, raises purely a question of law, namely, the construction of the will and codicils. Has the surrogate jurisdiction to determine this question ?

The Code (§ 2472, *subd.* 3) provides that the surrogate's court has power "to direct and control the conduct and settle the accounts of executors, administrators and testamentary trustees;" (*subdivision* 4) "to enforce the payment of debts and legacies, the distribution of the estates of decedents, and the payment or delivery by executors, administrators and testamentary trustees of money or other

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property in their possession belonging to the estate;" (*sub-division 6*) "to administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto."

By section 2743 it is provided that "where an account is judicially settled, as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, a decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights."

By section 2481, subd. 11, it is provided, among other

[1] things, that the surrogate's court has power "to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred."

*In re Young*, (92 N. Y. 235-238), upon an application to cause the executor to set apart the exempted articles to the widow, it was held that the surrogate had jurisdiction under his authority "to direct and control the conduct of executors and to administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto," to construe an antenuptial agreement made between the widow and her deceased husband.

The court of appeals, *In re Verplanck* (91 N. Y. 439, 450), has held that, as incident to the duties cast upon the surrogate's court by the provisions of section 2743,

[2] the surrogate must have jurisdiction to construe wills, so far as needful, at least, to determine when legacies shall be paid. See, also, *Garlock v. Vandevort*, 128 N. Y. 374.

It would seem that these authorities settle conclusively that the surrogate has jurisdiction to determine the

[3] matters raised by the first subdivision of the answer or objections of Samuel W. Havens.

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The second subdivision of the objections made by Samuel W. Havens raised two questions,—one of fact, and one of law: First, was the alleged agreement made? Second, if made, is it a valid agreement? As to the latter question, there is no room for a doubt. If this court, as an incident to powers expressly granted, may construe wills and antenuptial agreements, as the cases above cited hold, why has it not power to construe any other writing or agreement? The power to construe an agree-

[4] ment necessarily includes the power to pass upon its validity. Thus I reach the conclusion that the question of law raised by the second subdivision of the objections filed may be determined by the court.

The only question remaining is, has this court jurisdiction to try the question of fact raised,—to determine, in case the will be construed to mean that Alonzo Havens is the sole residuary legatee, whether or not he has transferred one-half of his legacy to his brother, Samuel W. Havens? In other words, on an accounting when the legatee claims the whole amount of the legacy, and another claims to be an assignee of the same, or a portion thereof, can this court determine the controversy between them? It is commonly asserted that a surrogate's court has no jurisdiction to try a disputed claim. This assertion may or may not be true. It may be safely stated that, as a

[5] general rule, such court has no jurisdiction to try and determine the validity of a disputed claim against an estate.

In a proceeding under section 2718 to compel the payment of a debt, legacy, or distributive share, when the executor or administrator makes the verified answer

[6] prescribed by that section, denying the validity thereof, the surrogate must dismiss the proceeding without prejudice to an action or an accounting in behalf of the petitioner. Under proceedings for the sale of the real



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estate of the decedent, any claim may be contested before the surrogate,—even a claim which has been presented to the executors or administrators, and rejected by them. *In re Haxtum*, 102 N. Y. 157.

The statute having, as above seen, conferred jurisdiction in one proceeding to try and determine the validity of a disputed claim against an estate, and prohibited

[7] such jurisdiction in another proceeding before the same court, it seems clear that the question of jurisdiction in any proceeding must be determined by the statutory provisions relating thereto, this being so, a decision upholding or denying jurisdiction in one proceeding is no authority for or against the jurisdiction in any other proceeding. A failure to recognize this fact has led to confusion, and, I believe, error.

Another expression frequently used is that “a surrogate’s court has no general equity jurisdiction.” Just how much is meant by the word “general,” no one has attempted to define. Its use implies that at least a limited equity jurisdiction is possessed by that court. What is the line of division between the limited equity jurisdiction which it is conceded has been conferred upon the court and the general equity jurisdiction which it does not possess.

Subdivision 6 of section 2472 gives to a surrogate’s court power “to administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto.” If the last clause, “according to the provisions of the statutes relating thereto,” had been omitted in defining the power granted by the subdivision above cited, I am of the opinion it would have amounted to a grant of full or general equity

[8] jurisdiction in all matters relating to affairs of decedents. To do justice in all such matters is to do what is right and equitable therein. How far is this

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power to do justice or equity in all matters relating to the affairs of decedents limited by the clause, "according to the provisions of the statutes relating thereto"? Is this a limitation of the equitable powers of the court as to the subject-matter over which those powers may be exercised? Or is it a limitation only as to the manner in which they shall be exercised? Clearly, the latter. Here, then, we have a grant of equitable powers in all matters relating to the affairs of decedents coming before the court in the manner provided by the statute. But this general power is limited by restrictions upon its exercise found in the provisions of the statute relating to the various special proceedings which may come before the court.

I have therefore arrived at the conclusion that a surrogate's court has full equitable jurisdiction in all matters relating to the affairs of decedents, except so far as that jurisdiction may be limited by the provisions of the statute relating to the special proceeding in which the question of jurisdiction, may arise.

In most of the cases which I have examined the general proposition is asserted that no general equity jurisdiction is conferred, and then an effort is made to find authority, either direct or incidental, in the provisions of the statute relating to the special proceeding before the court; and, if not there expressly conferred, then its existence has been denied. The power granted by subdivision 6, above cited, in most cases where the decision has denied jurisdiction, has been generally unnoticed.

Starting, then, with the proposition that upon an accounting the surrogate's court has jurisdiction to do justice or equity between all persons properly before it, in all matters relating to the estate, let us inquire how far such power has been limited by the provisions of section 2743. That section provides:

"When an account is judicially settled as prescribed

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in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees . . . or their assigns [the point reached in this matter], the decree must direct the payment and distribution thereof to the persons entitled according to their respective rights."

Thus far, instead of a limitation upon the equitable powers of the court, we have imposed a duty to distribute the fund on hand between the legatee and his assignee, if there be one, according to their respective rights. The imposing of a duty confers power for its performance, and that power thus conferred carries with it such incidental power as are necessary to carry it into effect (*section 2481, subd. 11*). How, in this case, can this court make a decree for the distribution of this estate to the legatee and the other claimant according to the respective rights without determining their rights? In order to determine the rights of those parties, the court must try the controversies between them.

A question may be raised as to the effect of that portion of section 2743 which provides that "where the validity of a debt, claim, or distributive share is not disputed or has been established, the decree must determine to whom it is payable," etc. This clause undoubtedly prohibits a surrogate's court from trying a disputed debt or claim against the estate,\* but what can be meant by the "validity of a distributive share"? The distributive share of a

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\* In *Tucker v. Tucker* (4 *Keyes* 136), the court of appeals held that a surrogate has no jurisdiction upon an accounting to hear and determine the validity and amount of a disputed claim of a creditor against the estate. See also to similar effect *Glacius v. Fogel* (88 *N. Y.* 434); *Bevan v. Cooper* (72 *N. Y.* 317); *Disosway v. Markham* (77 *N. Y.* 400); *Magee v. Veeder* (6 *Barb.* 352); *Disosway v. Bank* (24 *Barb.* 240); *Andrews v. Wallace* (29 *Barb.* 350); *Cooper v. Felter* (6 *Lans.* 485); In *Estate of Stevens* on (77 *Hun.* 203), it was held that a proceeding by an alleged creditor for an accounting should be dismissed where it appeared that the creditors claim had not been conceded or allowed.

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legatee is fixed by the will, and, in cases of intestacy, by the statute of distributions. We have seen before that, as to a legacy, a surrogate's court has full power to construe the will, and no court would assume to question the validity of the statute of distributions.

As to the clause under consideration, I concur fully with the opinion expressed in *DuBois v. Brown* (1 [9] *Dem.* 317), that the words "distributive share" must have been inadvertently used, and that the only intent of that clause was to settle the question, which had long agitated our courts, as to the jurisdiction of a surrogate, upon the judicial settlement of the accounts of the executor or administrator, to try a contested claim against the estate.

From an examination of the statute I am strongly of the opinion that jurisdiction to try the issue raised exists in this court. I will not, however, determine the question upon my own construction of the statute, but will examine the authorities bearing directly upon the point raised.

Redfield, in his valuable work on the *Law and Practice in Surrogate's Courts* (4th Ed., p. 752), says, "Where the original party in interest and the alleged assignee both claim the same interest, the surrogate cannot try the question of the validity of the assignment," and cites in support of this proposition *Decker v. Morton* (1 *Redf.* 477), and *In re Estate of Heclas* (5 Ed. 440).

An examination of the case of *Decker v. Morton* reveals the fact that the surrogate did pass upon the [10] validity of the assignment, holding it invalid.

Upon appeal to the general term, Ingraham, J., delivering the opinion of the Court, says: "It is not clear that the surrogate had any jurisdiction to try the question as to the validity of the assignment. . . . But, upon the merits, I think the surrogate, if he had jurisdiction, did not err."

Slight authority in favor of the proposition stated. But all its force is dissipated when we consider that the case was decided under the provisions of the Revised Statutes, in which "assignees" were not enumerated among those to whom payment or distribution was to be decreed "according to their respective rights."

The other case (*In re Estate of Heelas*) was decided [11] under the Code. All that was held in that case was that creditors of a distributee are not proper parties to an accounting of the administrator, and cannot there contest the validity of an assignment of his distributive share, and the share was decreed to be paid to the assignee.

In that case the surrogate says: "As the statute now authorizes the court to decree payment to an assignee of a legatee or next of kin, etc., if the assignor were to appear on such an accounting, and dispute the validity of the assignment, doubtless it would be the duty of the court to hear and determine the controversy, in order to decree payment to the person entitled thereto."

*In re Brown*, (3 *Civ. Pro.* 39), it was held that the [12] court had no jurisdiction to determine the validity of an assignment.

On the other hand, it has been held *In re McCabe's Estate*, (18 *N. Y. Supp.* 715), that under section 2743 the surrogate, in settling an account, has power to try [13] and determine the validity of an assignment of his distributive share by one of the next of kin, who appears, and attacks the assignment on the ground that it was made without consideration, and was procured by false and fraudulent representations.

*In re Estate of Orser*, (4 *Civ. Pro.* 129), it was held that section 2743 does not forbid surrogates from [14] deciding a controversy in regard to the title, or any other question concerning a legacy or a distributive share.

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The authorities upon the specific question presented seem to be in favor of the jurisdiction of the surrogate. It is to be regretted that the precise question here involved has not been squarely passed upon by the higher courts.

In the case of *Riggs v. Cragg* (89 N. Y. 479-491), the court of appeals held that the surrogate's court had [15] no authority to try an issue as to the validity of a legacy raised by an executor on an application for an order directing him to pay the legacy.

In discussing the question of jurisdiction presented by that issue, the court says: "When the surrogate, upon such an application, can see that other persons claim, or may claim, the same thing as the petitioner, and that a real question is presented, as to the right of one of several persons to the legacy or fund, natural justice requires that he should not proceed to a determination without the presence of all the parties who may be affected by the adjudication. The statute provides for bringing in all the parties in interest, on the final accounting, and, in that proceeding, jurisdiction is conferred to settle and adjust conflicting rights and interests, while no such authority is conferred in the special proceeding in favor of a single creditor or legatee, and such authority was not, we think, intended to be given."

Here is clear expression of the opinion that under the revised statutes the surrogate had jurisdiction, on a final accounting, to settle and adjust the conflicting rights and interests of all the parties before him, as to the legacy or fund.

*In re Verplanck* (91 N. Y. 439-450), the court, in speaking of the powers of the surrogates, under the [16] Code of Civil Procedure, as compared with those granted by the revised statutes, says, "It was clearly not the intention of the Code to narrow or diminish the jurisdiction of surrogates, but rather to enlarge it."

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 Central Park Baptist Church v. Patterson.
 

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The section under consideration (2743) contains an illustration of the intent to enlarge the jurisdiction, in that it includes assignees of a creditor, legatees, next of kin, husband or wife among those to whom the decree must make distribution.

By the weight of authority, as well as by my own understanding of the provisions of the Code, I am constrained to overrule the objection made to the jurisdiction of the court, and hold that it has jurisdiction to hear and determine all the questions raised by the objections filed by Samuel W. Havens. Ordered accordingly.

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CENTRAL PARK BAPTIST CHURCH, RESPONDENT  
v. PATTERSON, APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM;  
AUGUST, 1894.

§ 2235.

*Forcible entry and detainer—what constitutes issues—what tried in* }  
*proceedings.*

The question of title to real property is in no way open for discussion in a proceeding for a forcible entry where the gist of the proceeding being a peaceable possession by plaintiff under a color of title and a forcible disturbance of that possession by the defendant; the irregularity of the method whereby the peaceable possession was obtained does not affect the question. Occupancy by and a removal of the petitioner at the time of the entry alone being sufficient to support the proceeding.

Although an entry upon real property is not accompanied by a breach of the peace, it is a forcible entry if accomplished by a multitude of people and the removing of locks from the doors of the building.

(Decided August 1, 1894.)

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Central Park Baptist Church v. Patterson.

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Appeal by the defendant from a final order of the district court of the city of New York for the 7th judicial district awarding the respondents possession of certain real property in proceedings for forcible detainer.

The facts are stated in the opinion.

*Herbert N. Gibbs*, for defendants, appellants.

*J. C. Julius Langbein*, for petitioner, respondent.

BOOKSTAVEN, J.—A dissension having arisen between the members of the church controlled by the plaintiff, a religious corporation, over the advisability of dismissing the pastor in charge, the minority, including the pastor, left the premises at a certain meeting of the church and the keys of the building were by the sexton placed in the hands of the petitioner herein in accordance with the resolutions of the majority, it being then further resolved that the pastor be dismissed, and the church building remain closed, under control of petitioner, pending the selection of a successor. In accordance with such resolutions, petitioner closed the building, placing new locks thereon and retained possession of the keys. On the Sunday next ensuing, the defendants, with a following of the dissentient members to the number of one hundred persons, entered the building by removing the locks, and maintained devotional exercises. This proceeding was instituted for forcible entry, and the trial resulted favorably to the plaintiff.

The chief point raised by appellant's counsel related to the question whether or not the proceeding was maintainable under the verified petition of Fraser, alleged to be chairman of the board of trustees of the corporation owning the church into which the forcible entry is claimed to have been made, but no discussion of this question in our



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judgment is necessary, for by the terms of section 2235 of the Code of Civil Procedure the petition may be made by an agent of the party in possession of the premises and it appears from the evidence that the majority of the members claiming to represent the corporation had placed the petitioner in possession and had constituted him the custodian of the building, as agent, and this agency we think sufficient to enable him to maintain this proceeding. The question of title to the premises is in no way open for discussion in this proceeding. The gist of it being a peaceable possession by the plaintiff under color of right and a forcible disturbance of that possession by the defendant. (*Kelly v. Sheehy*, 60 *How. Pr.* 439 and see 18 *Am. Dec.* 139c, note). Whether or not the individuals in possession actually represented the corporation, or had power to constitute the petitioner the custodian of the church edifice is immaterial. They had possession of the building, that possession was peaceable and the individual in whose name this petition was made was by these parties given power to act in the premises. The regularity of the methods whereby this peaceable possession was obtained, does not affect the question (*Cain v. Flood*, 21 *Civ. Pro.* 116; 38 *St. Rep.* 196; 14 *N. Y. Supp.* 776), and an actual occupancy by and removal of the petitioner at the time of the entry is not essential to support these proceedings. (*People v. Field*, 52 *Barb.* 198). The remaining question raised is whether or not the entry was "forcible" within the meaning of the statute (*Code Civ. Pro.* sec. 2233), it being claimed that the defendant's actions were orderly and that no breach of the peace occurred. The undisputed facts admit only of an affirmative answer. While the mere removing of locks from the doors of a building by an individual for the purpose of obtaining ingress, may not be sufficient to constitute a forcible entry as distinguished from a simple trespass, yet in this case the

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“multitude of people” which the statute contemplates were associated with the defendants in their acts when entering upon the premises, and the alternative of a “strong hand” is not necessarily looked for in support of the proceedings (*Code* § 2233). The statute with regard to these proceedings was enacted with a view of maintaining the peace (18 *Am. Dec.* 139, note), and a case of mere trespass has been held not to call for the special redress here afforded in a case where the peace is not disturbed nor endangered by the act. But where the entry is made by a multitude, as was the case here, “the peace” is in less danger of being broken in the aspect of a direct personal encounter than would be the case if the entry were made by an individual alone. In fact, the greater the multitude the greater the “peace” would be in this respect and it is against an entry under terrorizing conditions that the statute is aimed. The mere fact that the defendants found it expedient to solicit protection from the police upon this occasion and secure the presence of a number of officers, is most significant in disproving the theory that the entry was not made nor intended to be made with force as against the plaintiff. It was not the province of the police to place the defendants in possession of the premises, and the presence in aid of the undertaking had the effect of but increased the force of the multitude. The exceptions taken by appellants, upon the trial are not made the basis of reliance on this appeal, and nothing further is found in the case which would call for consideration.

The final order is affirmed, with costs.

GIEGERICH, J.,—concurred.

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Brewster v. Wooster.

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BREWSTER, APPELLANT v. WOOSTER, RESPONDENT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL  
TERM, OCTOBER, 1894.

§§ 3268 *et seq.*, 3272, 3276.

*Security for cost—requiring additional security.*

Where it appears that the security for costs already given by a non-resident plaintiff pursuant to an order made under section 3272 of the Code of Civil Procedure is insufficient, the court may require further security notwithstanding the undertaking first given exceeds in amount \$250.

Republic of Honduras v. Soto (112 N. Y. 310) distinguished.  
(Decided October, 1894.)

Appeal by plaintiff from an order of the special term requiring the giving by him of additional security for costs.

*Arnoux, Ritch & Woodford*, for plaintiff, appellant.

*T. B. Browning*, for defendant, respondent.

MCADAM, J.—On September 28, 1892, the court, upon the defendant's motion, required the plaintiff, a non-resident of the State, to file security for costs in the sum of \$1000. This order was complied with. Subsequently, and on June 20, 1894, the court, upon like motion, made a further order, requiring the plaintiff to make a deposit of \$500 or give an additional undertaking for costs in that amount.

The appeal is from the order last referred to, and is founded on alleged want of power in the court, as well as upon abuse of discretion.

Section 3276 of the Code, in reference to "security for costs," provides that "at any time after the allowance of

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an undertaking, given pursuant to such an order, or as prescribed in section 3272 of this act, or after notice of the payment into court pursuant to such an order, the court or Judge thereof, upon satisfactory proof that the sum specified in the undertaking or the amount of such payment is insufficient . . . must make an order requiring the plaintiff to give an additional undertaking or make an additional payment into court."

The moving affidavit proved that there had been four trials of the action, two general term arguments and one appeal to the Court of Appeals, and that at the last trial, the defendant's costs as taxed, including an allowance, aggregated \$1245. Under such circumstances there was clearly no abuse of judicial discretion in requiring the plaintiff to furnish security as a non-resident in the sum of \$1500: and this is the sum of the two undertakings required.

The appellant contends that if the undertaking first given exceeds in amount the deposit required by section 3272 (\$250), there is no warrant for an additional undertaking. The Code provisions are not so limited, and will not bear any such restricted construction. Section 3272 does not prescribe the amount of the undertaking, but section 3273 does, by requiring that "The undertaking, specified in the last section, must be executed to the defendant by one or more sureties, and must be to the effect that they will pay, on demand, to the defendant, all costs which may be awarded to him in the action, not exceeding a sum specified in the undertaking, which must be at least \$250."

The *Republic v. Soto* (112 N. Y., 310), referred to by the appellant, was decided in 1889, two years before the Code amendment of 1891, and is inapplicable not only on that account, but also for the reason that no deposit was made here, as it was there.

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The Code provisions cited show clearly that the court had jurisdiction to require the additional undertaking, and acted strictly within the limits of the power conferred; and there being no abuse of discretion, it follows that the order appealed from must be affirmed, with costs.

FREEDMAN, P.J., and GILDERSLEEVE, J., concurred.

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WEILL, v. THE METROPOLITAN RAILWAY  
COMPANY.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL  
TERM, OCTOBER, 1894.

§ 723.

*Amendment of complaint—power of Court at Special Term, to allow.*

Where in an action against an elevated railroad company the complaint attempted to set forth a cause of action in equity and asked as relief that the defendants be enjoined and restrained from maintaining their structure in front of the plaintiff's premises and for damages, but was defective as a bill of equity in omitting to allege that the trespass was of a continuing nature,—*Held*, that the court at special term could and would allow an amendment of the complaint by inserting the omitting allegation; that the effect of such amendment was not to change the cause of action from one at law to one in equity, but merely to supply a deficiency.

Where levy to amend was sought after the cause had been called at equity term for trial and a motion to dismiss had been made, and leave granted to apply at special term for relief, payment of all the costs of the action would not be required as a condition of the amendment, but as the amendment was merely formal, it would be allowed on payment of \$30 costs and without prejudice to the proceedings already had.

*Robertson v. Robertson* (9 *Daly*, 52); *Val Syckels v. Perry* (3 *Robt.*, 622); *Lane v. Bean* (19 *Barb.*, 51), distinguished.

The word "amend" defined.

(*Decided October, 1894.*)

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Weill v. The Metropolitan Railway Company.

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Motion by plaintiff for leave to amend complaint herein.

The facts are stated in the opinion.

*J. Kohler and W. M. O'Dwyer* for plaintiff and motion.

*C. W. Gardiner, A. T. Stoutenberg and L. W. Berkelay (Davies, Short & Auerbach, Attorneys)*, for defendants, opposed.

MCADAM, J.—The action is against the Elevated Railway Company. The complaint attempted to set forth a cause of action in equity, and the prayer for relief is “that the defendants be enjoined and restrained from maintaining their structure in front of the plaintiff’s premises,” and for \$10,000 damages.

As a bill in equity, it is defective in omitting to allege that the trespass was of a continuing nature, so as to show affirmatively that the remedy at law was inadequate. When the cause was called for trial at the equity term, the defendant’s counsel pointed out the omission on a motion to dismiss, whereupon the plaintiff’s attorney attempted to supply the defect by amendment, but the presiding judge directed that the application be made at special term; hence the present motion. The defendants insist that the motion attempts to transform an action at law into a suit in equity, and, on this theory, they deny the power of the court to grant the relief demanded. The cases relied on to support this objection hold that a plaintiff cannot amend by introducing new and independent causes of action, because (unlike a defendant) he has a complete remedy therefor by a new suit (*Robertson v. Robertson*, 9 *Daly*, 52; *Van Syckels v. Perry*, 3 *Robt.*, 622). So, in *Lane v. Beam* (19 *Barb.*, 51), the plaintiff undertook to change his entire cause of action, and the Court, in denying the

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application, said: "The Code allows an amendment by correcting a *mistake* in the name of a party, or a *mistake* in any other respect. But here there was no mistake; there was a deliberate purpose in making the statement of the cause of action as it is." The present application is simply to supply a deficiency; to make perfect the right to the equitable relief claimed. The avowed purpose here was injunctive relief, with damages as an incident thereof, and the omission of the allegation as to continuing trespass a mistake amendable under the Code provisions (§ 723).

To amend is, as the term implies, "to free from error or deficiency; to correct an error; to supply a deficiency" (*Bouvier L. Dic.*). No one can seriously question the power of the court at special term to grant liberty to amend and perfect what was previously set forth in an imperfect manner (*Brown v. Leigh*, 49 *N. Y.*, at p 80; *Wilson v Smith*, 59 *N. Y. Superior Ct. R.*, 380; and see 4 *Wait's Pr.*, 656 657), and that is the extent of the relief applied for.

In *Ireland v. R. R. Co.* (8 *St. R.* 127) and *Marsh v. McNair* (40 *Hun.* at p. 217) the court imposed, as a condition of allowing certain amendments, the payment of all the costs to date; but in those cases the amendments were allowed after new trials had been awarded, and the relief granted was substantial, because it affected the costs of the appeals on which the party against whom the amendments were allowed had been successful. The present case is not so situated, and as the amendment is formal merely, it will be allowed, on payment of \$30 costs, and without prejudice to the proceedings already had. The amended complaint may be served with the order to be entered hereon, and the defendant will have twenty days thereafter within which to answer the same (*Fink v. R.R. Co.*, 29 *St. R.*, 155).

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Zacharias v. French.

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ZACHARIAS v. FRENCH

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
NOVEMBER, 1894.

§§ 500, 507.

*Pleading—separately stating and numbering defenses—denials as part of defenses consisting of new matter.*

Considerations of defense and orderly pleading require that defenses should be separately stated and numbered and relied upon respectively as complete and partial defenses.

*It seems* that a defendant may count upon the same facts as a complete and as a partial defense, and that he may put his defense upon separate and even inconsistent grounds and may plead several pleas in distinct parts of the same counts.

The same facts may be pleaded both as a complete and a partial defense, provided each defense is separately and numbered. According—*Held*, where facts pleaded in a paragraph of an answer might constitute either a complete defense to the action or plead in litigation of damages, the defendant should be required to separately state and number the defenses.

Upon a motion to require the defendant in an action to state whether defenses pleaded in his answer are relied upon and intended as complete or as a partial defense to the complaint, the court may under the prayer "for such other and further relief as may the just," direct the defendant to separately state and number the defenses.

A statement of new matter as a defense in an action should not be associated or mingled with denials contained therein, and therefore, where as a part of such defense, it is stated that the defendant "reiterates and re-asserts each and every allegation and denial contained in the answer," the "denial" will be stricken out.

(Decided November 17, 1894.)

Motion by plaintiff that the defendant be required to state in his answer whether certain defenses therein are relied upon as complete or partial defenses and also that there be stricken from such answer the words "reiterates



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and re-asserts each and every allegation herein before contained" in a defense consisting of new matter for "such other and further relief as may be proper."

The facts are stated in the opinion.

*W. E. Benjamin*, for plaintiff and motion.

*I. M. Dittenhoefer*, for defendant, opposed.

GIEGERICH, J.—This action is brought to recover damages for the expulsion of the plaintiff from the theatre of the defendant without cause. The answer denies all the material allegations of the complaint, except the ownership of the theatre by the defendant, and sets up the following affirmative defenses :

"V. As and for a second and complete as well as partial answer and defense, this defendant alleges upon information and belief, that at the time claimed by the plaintiff in his complaint to have purchased the license for himself and wife to witness the performance given at the Garden Theatre on the 22d day of May, 1893, the license and privilege to witness the performance at the said theatre on said evening was a revocable license and the said license and privilege for said evening, if ever granted to the plaintiff or his wife, to witness the performance on said 22d day of May, 1893, was duly and regularly revoked and there was duly and regularly tendered and offered to the plaintiff the sum claimed by him to have been paid for said license and thereupon all rights of the plaintiff and his said wife to witness the said performance or to remain in said theatre ceased and terminated.

"VII. As and for a third and further and separate answer and complete as well as partial defense, this defendant, reiterating and re-asserting each and every allegation and denial hereinbefore contained, further alleges

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**Zacharias v. French.**

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on information and belief, that only such request was made to the plaintiff to leave the said theatre as was proper and necessary and was made after the revocation of any license plaintiff claimed to have to remain in said theatre or witness said performance."

The plaintiff now moves that the defendant be required to state in his answer whether the so-called second and third separate defenses thereof are each relied upon and intended as a complete or as a partial defense to the complaint, and to strike out from the so-called separate answer the words "reiteration and re-asserting each and every allegation and denial hereinbefore contained," and for such other and further relief as may be proper in the premises.

One of the chief grounds urged by the plaintiff in support of the first branch of the motion is, that the question whether the facts set forth respectively in paragraphs V and VII above constitute a complete defense, cannot be tested by demurrer in the form now pleaded, since the same would be overruled if the facts stated were good in mitigation of damages. No authority directly in point is cited by either side; but considerations of convenience and orderly pleading require that the defenses should be separately stated and numbered, and relied upon respectively as complete and partial defenses (*Pomeroy's Code Defenses*, 3d Ed., § 690, p. 756). This is in harmony with the provisions of section 507 of the Code of Civil Procedure, which provide, that "A defendant may set forth, in his answer, as many defenses or counter-claims, or both, as he has. . . . Each defense or counter-claim must be separately stated and numbered."

I do not perceive why, under modern rules of pleading, the defendant may not count upon the same facts both as a complete and a partial defense. A defendant may put his defense upon separate and even inconsistent grounds.

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(*Goodwin v. Westheimer*, 99 *N. Y.* 157), and he may plead several pleas to distinct parts of the same count (*Longworthy v. Knapp*, 4 *Abb. P. R.* 115, 117; *Stephen's Pleadings*, 269). It seems to follow that the same facts may be pleaded both as a complete and a partial defense, provided each defense is separately stated and numbered. These views lead to the denial of that branch of the motion under consideration, provided the defendant shall separately state and number the defenses set forth in paragraphs numbered V and VII of the answer; the granting of which relief, although not specifically prayed for, nevertheless finds ample justification in the concluding sentence of the notice of motion herein (*Van Slyke v. Hyatt*, 44 *N. Y.* 259, 264; *Myers v. Rosenback*, 7 *Misc.*: 560, *Aff'd* 9 *Misc.*, 89.)

As to the motion to strike out the words "reiterating and re-asserting each and every allegation and denial hereinbefore contained," the following remarks of Professor Pomeroy in his work on *Code Remedies* (3d ed. at p. 756 and § 690), are directly in point, viz.:

"It is elementary that a defense of new matter should be pleaded; and as new matter must of necessity be a distinct defense from a denial, it follows that it cannot properly be associated or mingled up with denials general or specific in one paragraph or plea." Consequently the words "and denial" in the last phrase quoted must be stricken out. To hold otherwise would enable the defendant to nullify the provisions of section 494 of the Code of Civil Procedure, which allow a demurrer to a defense consisting of new matter, contained in the answer (*De Witt v. Brill*, 6 *Misc.*, 44).

Except as above indicated, the motion is denied with \$10 costs to the plaintiff to abide the event.

Please give one day's notice of settlement of order.

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Excelsior Steam Power v. The Cosmopolitan Publishing Company.

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EXCELSIOR STEAM POWER, RESPONDENT *v.*, THE  
COSMOPOLITAN PUBLISHING COMPANY,

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,  
OCTOBER, 1894.

§ 644.

*Attachment—upon what debt can be levied—mode of levying.*

A liability which is merely a dependent upon the contingency which may never happen, it is not a debt upon which an attachment can be levied.

Where the defendant in an attachment at the time an attempt was made to levy, it was engaged in printing a magazine for which nothing could become owing to him unless and until he had completed the printing thereof,—*Held*, that there was then no debt upon which an attachment could be levied, and no lien was equitable until the money became due upon the completion of the work by a service of a copy of the attachment and notice of levy upon the party for whom it was done.

A debt cannot be attached as to one person and not as to another, and therefore the attachment cannot be good as against the attachment debtor and ineffectual as to other persons.

The commencement of an action to collect a debt owing the attachment debtor and upon which there has been an attempt to levy the attachment is not equivalent to a new and additional levy. Such levy can only be made in the manner provided by law for the original levy.

*It seems*, that payment to a sheriff holding an attachment of a debt owing the attachment debtor will not protect the one making the payment as against such attachment debtor unless he can show that the debt was duly attached.

In an action brought by the attachment creditor and the sheriff to reduce to possession or collect a debt alleged to have been attached and an agreement by the defendant to pay the plaintiff the moneys due him will not sustain the action, which is strictly statutory, and this is especially so where he does not set forth such alleged contract.

In an action by an attachment creditor and the sheriff to recover a debt due the defendant in the attachment and alleged to have been attached, the defendant is not estopped from denying the

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Excelsior Steam Power v. The Cosmopolitan Publishing Company.

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indebtedness by admissions made prior to the issuance of the attachment where he has not given the sheriff a certificate acknowledging the indebtedness.

(Decided October, 1894.)

Appeal by the defendant from a judgment entered upon a report of a referee in favor of the plaintiffs.

The facts are stated in the opinion.

*William L. Findley*, for defendant, appellant.

*Harold Swain*, for plaintiff, respondent.

BARRETT, J.—The plaintiff's difficulty in this case is that the particular debt due by the defendant to Brown—to recover which this action was brought—was not attached. The attachment was served on the 14th of July, 1890. At that time there was nothing due by the defendant to Brown for the printing of the August magazine. This latter work was not completed until the 29th of July, 1890, and the defendant's indebtedness therefor did not accrue to Brown until thirty days after the latter date. This the referee expressly finds. He also finds that the defendant has paid to the sheriff all the money in which it was indebted to Brown when the attachment of the plaintiff company was served.

The rule with respect to the attachment of debts is well stated in the American and English Encyclopedia of Law, Vol. I, p. 896 :

“The debt for which an attachment will lie must be an actually subsisting debt, due, or about to become due, by efflux of time. If the liability be merely possible and dependent upon a contingency which may never happen, attachment does not lie.”

The rule is similarly stated in Drake on Attachment, 6th edition, § 551 :

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Excelsior Steam Power v. The Cosmopolitan Publishing Company.

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“The debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must, moreover, be absolutely payable, at present or in future, and not dependent on any contingency. If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt which is not certainly and at all events payable either at the present or some future period.” (See also *Wade on Attachments* § 17, and *Drake*, 6th edition, §§ 24 and 25, and *Mathot v. North River Bank*, 16 *N. Y. Civ. Pro. R.*, 314).

The present case is directly within this principle. What was due when the attachment was served has been fully paid to the sheriff. Beyond the sum so paid there was nothing then due or certainly to become due to Brown. Whether anything more would thereafter become due to him depended upon a contingency—namely, the doing by him of certain work. The printing of the magazine was a condition precedent to the defendant’s liability. Where property sought to be attached is incapable of manual delivery, the law as to levying is strict. Thus it has been held that where the levy is made by service of attachment and notice upon the person against whom the demand is made, the latter must look solely to the notice to ascertain what property is attached and base his action thereon (*Hayden v. National Bank*, 130 *N. Y.*, 146).

As to property not specified in the notice, the Court held that the title was not divested and the holder thereof remained liable to the owner.

In *Anthony v. Wood* (96 *N. Y.*, 185) it was said by the Court of Appeals that that court had held, “as to the levy permitted to be made upon choses in action, that the attachment reached and became a lien only upon such

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debts *as at the time* belonged to the debtor by a legal title, and for the recovery of which he could maintain an action at law."

The learned referee acknowledges the force of the defendant's position and he concedes (citing *Hill v. Nat. Park Bank*, 47 *N. Y. Sup. C. R.*, 302) that had another creditor of Brown attached this same debt after the work had been completed and the price earned, such other creditor might well have gained a higher right than that of the plaintiffs. He holds, however, that as no other rights had intervened the defendant could not rely upon the objection.

This latter view cannot well be upheld. If interveners would have superior rights to those of the plaintiffs, it could only be because they had attached the debt and the plaintiffs had not.

There is no such thing as lawfully attaching the debt as to one person and not lawfully attaching it as to another. It was either attached or it was not attached. Here it was not attached because there was nothing to attach (beyond the sum which has since been paid to the sheriff) when the levy was made. The statute made ample provision for the attachment of the particular debt in question after it became due (Code of Civ. Pro., § 644), but the plaintiff did not choose to avail itself of the right given by this section to levy "from time to time and as often as necessary," until its claim was secured. The learned referee is in error in supposing that the commencement of this action was equivalent to a new and additional levy after the maturity of the debt. The additional levies referred to in section 644 are repetitions of the original levy upon subsequently discovered property, and such fresh levies can only be made in the manner provided by law for the original levy. Payment to the sheriff without an adequate levy would not protect the defendant. He could

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only defend himself against Brown by showing that the debt was duly attached.

The respondent's contention that the estoppel which the referee found against the defendant, with regard to its alleged offset, should also be applied to the maturity of the debt itself, is far-fetched and without merit. The statements upon which the estoppel was sound had no bearing upon maturity of the debt, but solely upon the offset. That is, upon an offset which might be made against the debt when it did mature. The estoppel did not hasten the maturity of the debt or affect the legal relations of Brown and the defendant with regard to it.

The defendant could not well estop itself into presently owing money to Brown—which the latter might never earn—by statements made to influence the plaintiff's conduct with regard to its rights.

This action, it will be observed, is not upon the promise found by the referee in his fifteenth finding of fact, quoted by Mr. Justice Follett. No such promise is averred in the complaint, nor would the sheriff have been a proper party to an action founded thereon. The present action is strictly statutory. It is brought by the plaintiff in the attachment and the sheriff, jointly, to reduce to possession what was actually attached. Admit that the defendant, as stated in the sixteenth finding of fact, waived all counterclaims which it then had or might thereafter have against Brown. The question still is, what was due to Brown—leaving out all question of counterclaims—at the time when the attachment was served? The referee says that the defendant's indebtedness to Brown did not then exceed \$1651.47, and that the latter sum has since been fully paid.

That would seem to dispose at least of this particular action. The defendant did not give the Sheriff a certificate acknowledging an indebtedness to Brown of \$2459.96.



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If such a certificate had been given, there would be some ground for the contention that, if the plaintiff in the attachment relied thereon and failed to attach other property (a fact, however, which does not appear), the garnishee should be estopped from denying its accuracy.

Short of such a certificate or of a distinct representation, made upon or after the service of the attachment, and for the express purpose of influencing the sheriff's action thereunder, to the effect that the property levied upon belonged, or the debt attached was due to the defendant, there can be no estoppel as against the actual fact. It would, indeed, be a strange rule whereby garnishees were to be estopped by admissions made to creditors of their creditor prior to the issuance of the attachment. Here the agreement between the plaintiff company and the defendant was made two days before the attachment was issued. Surely no estoppel was created thereby which could operate upon the attachment proceedings which followed. Whatever rights the plaintiff company may have acquired under the agreement were independent rights, not rights created by estoppel. And such independent rights cannot be impressed upon its *status* as attaching creditor of Brown. Brown was not a party to this independent agreement, and the relations between him and the defendant were not altered thereby. The defendant is, in fact, still liable to Brown for every penny which was not lawfully attached.

It was one thing for the plaintiff company to proceed against the defendant upon the promise found by the referee, another to proceed against Brown by attachment. As it chose the latter course it is impossible to hold that the Sheriff attached what in point of fact was not due to Brown and what might never become due to him, merely because the garnishee had previously promised such payment to the plaintiff in the attachment.

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The referee's error results from a failure to distinguish between the rights secured to the plaintiff company by the defendant's promise to it, and the rights which it secured under its attachment against Brown.

The attachment was against Brown alone. What the plaintiff company secured thereunder, it secured solely in Brown's right, not in its own. If, therefore, when the attachment was served Brown had no right of action against the present defendant for the sum here claimed, such sum was clearly not attached.

Now, Brown concededly had then no such right of action; none in his own right, none, certainly, in the right of the plaintiff company. For the promise made to the plaintiff company was, if anything—as Mr. Justice Follett well observes—a new and original undertaking founded upon a valuable consideration moving from such company.

Keeping this clearly in mind, we think it apparent that the particular claim here sued on was not attached. For, as we have seen, Brown had no such claim in his own right; and it certainly was not conferred upon him by a new and independent agreement between other parties.

It follows that the judgment should be reversed and a new trial ordered before another referee, with costs to the appellant to abide the event.

VAN BRUNT, P.J., concurred.

FOLLETT, J. (dissenting).—In 1890 the defendant was the proprietor of the Cosmopolitan Magazine, which was published monthly, and on the eleventh day of February in that year it entered into a contract with J. Wilson Brown by which it sold to him type for which he agreed to pay \$808.43 on the eleventh of August, 1890, and by which he also agreed to print and bind several successive monthly issues of said magazine for a price agreed on, the

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defendant agreeing to pay the amount due for each issue thirty days after it should be delivered by Brown to defendant. The plaintiff leased to Brown rooms in which he printed the magazine and power with which to operate the presses. The Gardnier Binding & Mailing Company bound the magazine for Brown, and, in June, 1890, he was indebted to that corporation in the sum of \$1,916.86. In June Brown absconded, and, July 3d, 1890, The Gardnier Binding & Mailing Company brought an action in the Superior Court against him to recover \$1,916.86, and on the same day attached a debt due from the defendant to Brown. At this date the defendant was indebted to Brown in a considerable sum over all counterclaims for work previously performed. On the twelfth of July Brown was indebted to plaintiff for rent of rooms and power. On this date the August number of the magazine was on Brown's presses. The plaintiff secured from Brown's books a statement of the accounts between Brown and defendant, which showed that defendant was indebted to Brown in the sum of \$2,459.90, and presented the statement to defendant. At this time the defendant had the right to eject Brown from the printing office and to refuse to furnish him with power. When the statement was presented to defendant it asserted that it had offsets against the claim of \$2,459.90, but agreed that if plaintiff would not dispossess Brown and would furnish power to print the August number of the magazine (then on Brown's presses) it would not set up any counterclaim against the demand of Brown against it, as shown by the statement and amounting to \$2,459.90.

The following are two of the findings in respect to the agreement between the litigants, and they are conclusive on the facts as the record contains none of the evidence.

"XV. That on the 12th day of July, 1891, the defendant promised and agreed with the plaintiff, the

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*Excelsior Steam Power v. The Cosmopolitan Publishing Company.*

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Excelsior Steam Power Company, that the defendant would pay the account as presented by Mr. Swain, if said plaintiff would furnish the power and premises so that defendant could get their magazine, which was then on Brown's presses. That the said plaintiff furnished such power, and the defendant got their magazine."

"XVI. That on the 12th day of July, 1891, the defendant, with full knowledge of all the facts and circumstances connected therewith, for a valuable consideration agreed to waive and did waive all counterclaims and setoffs against said Brown, which did then exist, or which might thereafter exist, in its favor by reason of the business dealings and relations theretofore had between the defendant and said J. Wilson Brown."

July 14th, 1890, the plaintiff brought an action in the Supreme Court against Brown to recover its debt, and on that day attached the debt owing by the defendant to Brown, and furnished rooms and power for the presses, and the August number of defendant's magazines was delivered July 29th, 1890, for which the defendant became indebted to Brown in the further sum of \$1415.96, which became due August 28th, 1890.

February 18th, 1891, the defendant paid to the Sheriff \$1651.47, which was \$808.43 less than \$2459.90. The \$1651.47 was applied on the prior attachment of the Gardnier Binding and Mailing Company, and the defendant refused to pay the \$808.43, but asserted its counterclaim for that amount due for type.

This action was brought to recover the \$808.43 and arrearages of interest.

The proposition that an attachment becomes a lien only on property or choses in action in existence when the writ is levied does not need the support of authority or of argument. A lien by legal process cannot be acquired on nothing. But this proposition does not seem to me to

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dispose of this case. On July 12th, 1890, when the agreement between the litigants was entered into, and on the 14th of the same month, when the plaintiff levied its attachment, the defendant was actually indebted to Brown in a considerable sum over and above all counterclaims. This fact is conceded and is established by the findings. An attachable subject existed on which the plaintiff by its warrant acquired a legal lien, subject of course to the lien acquired by the prior attachment of the Gardnier Binding & Mailing Company. Had the defendant remained silent it would have had the right to have asserted whatever counterclaims it had as against the attaching creditors. But it did not remain silent. On the contrary, in the language of the finding, it agreed that it would pay the account as presented (\$2459.90) if the plaintiff would furnish the power and premises so that defendant could get its magazine, then on Brown's presses. Pursuant to defendant's promise, the plaintiff furnished the premises and the power and the defendant received its August magazine in time to be issued.

By this contract, and the plaintiff's performance of it, the defendant is bound, and is estopped from asserting, as against the plaintiff, a counterclaim against the indebtedness as admitted on the 12th of July. Suppose the plaintiff had found chattels sufficient to pay his claim in defendant's possession, which defendant admitted to be Brown's property, and the plaintiff had attached them, and, it may be, omitted to take other attachable property—indeed the sheriff would have had no right to take more property than was sufficient to satisfy the plaintiff's claim and costs—while in fact the defendant was the owner of part of the chattels seized; in such a case the defendant would be estopped from proving the truth, that he owned part of the goods. Again, suppose that A has a claim for \$1000 against B, an absconding debtor, and C tells A that he owes

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B \$1200 which A attaches, and omits, as he must, to attach other property, C would be estopped from proving, as against A, that at the time he made the admission he in fact owed B only \$500, or nothing. The supposed cases are not different in principle from the one at bar. In consideration of the plaintiff's promise to permit the building to be occupied and its power to be used for defendant's benefit, the latter promised not to set up against Brown's claim any counterclaim, and the plaintiff having performed, and the plaintiff having reaped the benefit of performance, it cannot now escape the liability which it assumed. The plaintiff was under no obligation to furnish power and space so that defendant's August magazine could be printed in time for delivery, and the contract entered into July 12th, between the litigants was a new and an original undertaking on the part of both, and founded on a valuable consideration.

The judgment should be affirmed, with costs.

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HALLETT v. HALLETT,

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM,  
OCTOBER, 1894.

§§ 538, 756.

*Pleading—defense when shammed—plea of any action pending—transfer of interest.*

Where pending an action the cause of action was transferred and the original plaintiff died and the defendant having made default in not appearing or pleading, the person to whom the cause of action was transferred entered an order discontinuing the action, — *Held*, that the transferee of the cause of action was the successor interest of the plaintiff; that the personal representatives of the plaintiff did not have any interest therein and such transferee and

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not such personal representatives were entitled to revive the action and that the action was regularly discontinued.

In such a case where the transferee of the cause of action brought a second action upon the same claim and the defendant pleaded the pendency of the first action, as a defense,—*Held*, that upon proof of these facts, the answer should be stricken out as sham.

(Decided October, 1894.)

Motion by plaintiff to strike out as sham an answer served by the defendant in this action.

The nature of the motion, and the material facts are stated in the opinion.

*James W. Treadwell*, for plaintiff and motion.

*L. B. Bunnell*, for defendant, opposed.

GIEGERICH, J.—This is a motion to strike out as sham and frivolous the answer in this action. The complaint is upon a promissory note made by the defendant to the order of one Emeline D. Hallett, who it is alleged transferred the same to the plaintiff on or about the 12th day of May, 1894. The answer does not deny any of the allegations of the complaint; but merely sets up that on and prior to the 30th day of April 1894, said Emeline D. Hallett, was the owner and holder of said note, when an action was brought by her in this court against the defendant to recover the amount thereof; which action it is alleged is still pending, and which pendency the defendant pleads as a defence and bar to any recovery by the plaintiff as against the defendant in this action.

It appears conclusively from the papers submitted, that the defendant never appeared, demurred or answered in the action brought by said Emeline D. Hallett; that after the commencement thereof the cause of action was duly transferred and assigned to the plaintiff in this action by said Emeline D. Hallett, who subsequently died; that

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no letters testamentary or of administration have been issued upon her estate, and that said note and cause of action form no part of the estate. That on the 6th day of September, 1894, upon the application of the present plaintiff in this action and upon proof of the facts above stated, this court made an order discontinuing said action, without costs, which order was duly entered with the clerk of this court, and a copy thereof together with notice of entry was personally served upon the defendant on the 11th day of September, 1894, and that subsequent to such discontinuance the present action was commenced.\*

The defendant argues, that the first action is still pending; but the authorities do not favor his contention. The note and cause of action having been transferred to the plaintiff, she became the "successor in interest" of the said Emeline D. Hallett (*Higgins v. Mayor*, 136 *N. Y.* 214). As the personal representatives of the latter had no interest in the same, the plaintiff, and not they, were entitled to revive the action (*Coit v. Coit*, 92 *N. Y.* 509, 516, 517; *Higgins v. Mayor*, *supra*); but she was not

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\* In *Clark v. Clark* (7 *Robt.* 276), Judge Jones, at special term of the Superior Court says: "As regards the defence of another action pending, alleged in the tenth paragraph of the answer, the allegations in that paragraph were true at the time the answer was served, for no order of discontinuance had been entered. (See opinion in *Bishop v. Bishop*, ante p. 194.) But at the time this motion was noticed they were not true, because then an order of discontinuance had been entered. This paragraph must consequently be stricken out as sham. (1 *John Ch.* 397; 3 *How. Pr.* 414; 10 *N. Y. Rep.* 500.)"

This practice was not followed and was expressly disapproved of by the general term of the supreme court in the third department in *Douglas v. Stockwell* (21 *Week. Dig.* 256) where an order denying a motion to strike out as sham averments in an answer that goods to recover which the action was brought were taken by the defendant under an attachment in favor of a creditor were subsequent to the service of the answer the attachment was vacated. The court said in an opinion by Learned P. J. Boekes and Landon, J. J., concurring, "We have examined the practice laid down in *Clark v. Clark*, 7 *Robt.* 276, and we disapprove it."



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bound to continue the prosecution of the suit brought by her transferor, and could discontinue the same (*Banta v. Marcellus*, 2 *Barb.*, 373), without costs, especially as the defendant had never appeared therein (*Smith v. White*, 7 *Hill* 520; *Averill v. Patterson*, 10 *N. Y.* 500, 502).

It thus appearing beyond controversy that the first action had been regularly discontinued when this action was begun, it is self-evident that the allegations of the answer, as to the pendency of another action, are unfounded in fact. Consequently, the same must be stricken out as sham (*Clark v. Clark*, 7 *Robt.* 276; *Roome v. Nicholson*, 8 *Abb. Pr.*, *N. S.*, 343).

Motion granted with \$10 costs.

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SADLIER v. LYON,

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM,  
NOVEMBER, 1894.

§ 3297.

*Referee's fees on sale under judgment of foreclosure.*

Where two mortgages upon distinct pieces of property are foreclosed in one action by one judgment, the referee named in the judgment directing the sale is not entitled to double fees, as upon two foreclosures, but only to one fee

Section 3297 of the Code of Civil Procedure, relative to such fees, does not increase the fees but merely effects the maximum thereof.

The fees of a referee to sell real property upon the foreclosure of a mortgage where there has not been an adjournment of the sale as there is not a surplus are as follows: for receiving order of sale and posting notices, \$10; for attending sale, \$10; for report of sale, \$5. Total, \$25.

In addition to this sum he is allowed \$5 for drawing each deed, which sum is to be paid by the purchaser at the sale and is chargeable to him alone.

(Decided November 12, 1894.)

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nate the character of the action. It follows that the referee is not entitled to double fees herein.

I am confirmed in these views by almost similar language employed in section 3252, relative to additional allowances; and by the provisions of the statute of 1869 relative to the charge for "drawing each deed of premises sold," which indicates an intention to permit the sale of several pieces of property under one judgment of foreclosure and sale.

But assuming, for argument's sake, that these views are founded in error, the referee's fees are nevertheless assailable in the light of the above-cited statute. Conceding that he is entitled to double fees, he can charge only for the following services: for receiving order of sale and posting notices, \$10; for attending sale, \$10; for report of sale, \$5; total \$25.

There having been no adjournment, and there being no surplus, he cannot make a charge therefor.

The referee cannot properly claim the fee for drawing a deed to the purchaser as that is chargeable to the grantee (*Race v. Gilbert*, 102 N. Y., 298); but as the plaintiff bid in the property the fee of \$5 for drawing each deed is allowed. This brings up the total amount to \$30, and if the referee is allowed double fees, which I am not prepared to concede, he would not be entitled to more than \$60.

Inasmuch as the referee has retained the sum of \$110 for his fees, when, as has been shown, he is entitled at most to \$60, the motion must therefore be granted.

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Canary and another v. Russell.

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CANARY AND ANOTHER v. RUSSELL.

SUPREME COURT, SECOND DEPARTMENT; KINGS COUNTY  
— SPECIAL TERM, DECEMBER, 1894.

§ 66.

*Attorney's lien—to what extends—enforcement of.*

An attorney's lien upon his client's cause extends not only to the cause of action but to all incidents in the progress thereof, including its settlement, and the amount agreed to be paid thereupon; it extends both to the costs of the action and to any compensation due to him for services therein by agreement, either expressed or implied, and for these there are not two liens separately enforceable, but one indivisible lien.

The amount and extent of an attorney's lien for costs and compensation for services rendered in an action may be determined upon a summary application by the attorney for the enforcement of his lien, upon moneys agreed to be paid in settlement of the action.

(Decided December 11, 1894.)

Motion by Ira Leo Bamberger, attorney for the plaintiffs in this action, that the court fix and determine the value of his legal services, as attorney and counsellor-at-law, for the plaintiffs in this action and in other actions and proceedings, or refer it to a suitable person as referee to determine the value of such legal services and the amount due by the plaintiffs to said attorney; and why all payments under an agreement of settlement executed by the parties to this action should not be stayed, and the sums payable thereunder paid into court, until the amount due by plaintiff to said attorney is fixed and determined and fully paid out of the moneys payable under said agreement of settlement and for other and further relief.

This action was brought by the plaintiffs, who are theatrical managers, against the defendant Lillian Russell,

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an actress, to restrain her from performing as an actress for any person other than the plaintiffs, in violation of a contract made and entered into between the plaintiffs and the defendant, whereby, among other things, the defendant agreed to perform as an actress solely for the plaintiffs during a period specified in the agreement.

A preliminary injunction was granted in the action on July 17, 1894, restraining the defendant from performing under any other management than that of the plaintiff; and this injunction, modified in some respects, was continued in August, 1894, during the pendency of this action, and an appeal was taken by the defendant from this order after the argument of the appeal but before its decision. An agreement for a settlement of the controversy was made whereby Abbey, Schoeffel and Grau assumed the management of the defendant, agreed to give the plaintiffs eight per cent. of the gross receipts at the defendant's performance for thirty-five consecutive weeks; and guaranteed that the plaintiff's share thereof should not be less than \$500 per week; also gave plaintiffs two notes for \$5000, each due respectively in thirty and sixty days, to be applied in payment of plaintiff's share of the last week's receipts, the injunction to be kept alive meanwhile and to be enforced only in case the contract of settlement was not performed.

The terms of this agreement for settlement was communicated to the plaintiff's attorney, Mr. Bamberger, before it was consummated, and he immediately telegraphed to the plaintiffs approving thereof and requesting them to have the agreement of settlement and provide for his compensation, and reserve for him one fifth of amount to be paid in settlement.

Thereafter the agreement of settlement was, without further consultation with the attorney or his associate Mr. Koepke, concluded, and the plaintiffs received two notes for

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\$5000 each. On October 20, 1894, notice of the attorney's lien was served upon the plaintiff, upon the attorneys for the defendant and upon Messrs. Abbey, Schoeffel & Grau, stating that, in pursuance of section 66 of the Code of Civil Procedure, Mr. Bamberger claimed a lien, as attorney for the plaintiffs, to the extent of \$5500, upon the cause of action herein, and upon other proceedings that upon the moneys paid and to be paid to them under, and by virtue of, a contract of settlement dated September 20, 1894, executed by the firm of Abbey, Schoeffel & Grau and the plaintiffs and the defendants; also for a further claim, amounting to \$2475, for services rendered in twelve other proceedings, set forth at length in said notice but which were not in any way connected with the present action, to some of which the plaintiff, Canary, alone, was a party or interested; and to others both plaintiffs were parties. These two liens this motion intends to enforce.

Abbey, Schoeffel & Grau appeared upon this motion and presented an affidavit in which they admitted the making of the settlement, and stated that they are ready to pay the moneys due thereunder, as soon as the same may become due, as the Court may direct, and ask the Court to make a proper direction with respect thereto.

*Ira Leo Bamberger and Herman F. Koepke, for Attorney and motion.*

Where a dispute arises between an attorney and a client concerning the amount of the former's charges for services performed in an action, the Court, upon motion therein, may refer to a referee to hear and determine the subject in controversy and report to the Court (*Amsdell v. Martin*, 20 *N. Y. Weekly Dig.*, 371; *Brown v. Mayor*, 9 *Hun.*, 589; *In re Knapp*, 85 *N. Y.*, 288; *Taylor Iron & Steel Co. v. Higgins*, 80 *N. Y. Supp.*, 746; *Reavey v. Clark*, 9 *N. Y. Supp.*, 218; *Commercial Tel. Co., v. Smith*,

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10 *N. Y. Supp.*, 434; *Goodrich v. McDonald*, 112 *N. Y.*, 157; *Koster v. The Greenpoint Ferry Co.*, 5 *Civ. Pro.*, 146; *Boyle v. Boyle*, 12 *N. E. Rep.*, 709; *Randall v. Van Wagenen*, 115 *N. Y.*, 532; *Tullis v. Bushnell*, 65 *How. Pr.*, 467; *McCabe v. Fogg*, 60 *How. Pr.*, 488; *Whittaker v. R. R.*, 54 *N. Y. Superior*, 8; *Gallison v. Rawak*, 3 *Supp.*, 803; *Murray v. Jibson*, 22 *Hun.*, 388). The attorney has a lien upon the fund in this action for a general balance due him by the plaintiffs (*Bowling v. Todd*, 64 *Barb.*, 146; *Affirmed*, 52 *N. Y.*, 489; *Scott v. Darling*, 29 *Atlantic Rep.*, 994; *Machine v. Bouttelle*, 56 *Vt.*, 570, 578; *Schwartz v. Jenney*, 21 *Hun.*, 33; In the matter of *H.*, an attorney, 87 *N. Y.*, 525; *Ward v. Craig*, 87 *N. Y.*, 560). No notice of lien is necessary (*Casucci v. Allegheny*, 20 *N. Y. Supp.*, 343; *Washburn v. Mott*, 12 *N. Y. Supp.*, 11; *Williams v. Ingersoll*, 89 *N. Y.*, 508), and the attorney may proceed with action without leave of the Court (*Minto v. Baur*, 6 *N. Y. Supp.*, 444). In the absence of an agreement, the attorney is entitled to recover what his services were worth (*Van Every v. Adams*, 42 *Superior Ct.*, 126; *Starin v. Mayor*, 106 *N. Y.*, 88), and he is entitled to payment of his services as they are rendered (*Sessions v. Palmeto*, 26 *N. Y. Supp.*, 1076), the costs and the extra allowance belong to the attorney (*People v. Common Council, etc.*, 28 *N. Y. Supp.*, 158). The moving papers show that the determination of the attorney's claim involves the examination of a long account. Irrespective of that consideration, we have shown that he is entitled to a reference in this action. The client cannot claim a right to trial by jury (*Ackerman v. Ackerman*, 14 *Abb.*, 23; *Brown v. Mayor*, 11 *Hun.*, 23), nor can the attorney (*Kuhne v. Daly*, 23 *Hun.*, 282; *Matter of Fink*, 6 *Daly*, 116).

*Howe & Hummel*, for plaintiffs, opposed.

Cited in support of contention that the court has no jurisdiction to adjust the amount of the attorney's fees in a summary way on the attorney's application (*Dimick v. Cooley*, 3 *Civ. Pro.*, 141; *Haight v. Holcomb*, 16 *How. Pr.*, 173; *Fox v. Fox*, 24 *Id.*, 409).

*Olin, Rives & Montgomery*, for defendant, and *Abbey, Schoeffel & Grau*.

GAYNOR, J.—The lien of attorneys upon judgments recovered by them, and the proceeds thereof, did not have its origin in any statute. It grew out of the relation of attorney and client, and the injustice of allowing a client to take the proceeds of his attorney's work and skill without paying him therefor. As was said in one case, the lien was invented to protect attorneys from the knavery of clients. The method of enforcing the lien was by a proceeding in the action itself. The money was required to be paid into court, and was held until the amount due to the attorney was ascertained and paid thereout (*Goodrich v. McDonald*, 112 *N. Y.*, 157). It is true that when the said lien of attorneys had its origin, and for a long time thereafter, the compensation to attorneys was regulated by statute, and the only fees and charges which they could enforce were those prescribed by statute, so that the lien was for such fees and charges only. By the first Practice Code of this State, the statutes (2 *R. S.*, pp. 623–31) which constituted the fee bill were repealed, and it was also indicated that “all rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor or counsel for his compensation are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties.” It was also provided, however, that “there may be allowed to the prevailing party, upon the judgment, certain sums by way

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of indemnity for his expenses in the action; which allowances are in this act called costs" (*Code Pro.*, § 303). It will be observed that nothing was here said concerning any lien of attorneys. It has, however, been uniformly held that such lien continued. Whatever controversy there has been on the subject has been in respect of the extent of the lien and the method of its enforcement. It would be waste of time to discuss the cases which have arisen concerning the extent of the lien—whether it covered taxable costs only, or also included the compensation agreed upon; for in 1889 our present Practice Code was so amended that for all compensation arising out of agreement the attorney "has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment" (*Code Civ. Pro.*, § 66). These words are comprehensive enough to cover the cause of action and all incidents in the progress thereof, including its settlement and the amount agreed to be paid thereupon, which is the case now in hand. A settlement has been agreed upon, the defendant to pay a sum of money therefor. Her present managers are ready to pay the money and appear in this proceeding only to submit to any order the court may make. It is objected that the court may not in this application in the action itself, thus stop the money *in transitu*, determine the amount due to the attorney for the plaintiffs on *quantum meruit*, and pay him out of the fund, but that he must be left to bring an action for his services, in which the defendants therein (the plaintiffs herein) will be entitled to a jury trial. If an action were brought by the attorney to enforce his lien—for, as we have seen, he has a lien by express statute—the defendants therein would not be entitled to a jury trial; so



that objection need not be considered. The only question is whether the attorney's lien may be enforced in the action itself. As we have seen, that was the method of enforcing it when fee bills existed, and measured the compensation of attorneys. It would not be suggested that that has not also been the method in respect of taxable costs. It seems to me to follow that it is also a proper method in respect to compensation agreed upon; for there are not two liens, one for taxable costs and one for compensation, to be enforced separately, but, on the contrary, there is only one indivisible lien. The lien which has long existed in favor of attorneys, was by the said Code amendment extended unmistakably, and so as to do away with doubt or controversy, to any compensation due to the attorney by agreement, express or implied. It is the same lien in character and in equitable conscience which existed under the fee bill, only extended to meet the changed relations of attorney and client, in that they are permitted to agree upon whatever compensation to the attorney they please.

The motion is therefore granted, the court to take testimony at some convenient time; or a reference may be taken if the parties agree to it. The money may be paid into the Kings County Trust Company to the credit of the action, to await further order.\*

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\* The order entered on this decision after reciting the papers used, and the names of counsel appearing continued as follows

" *Ordered*, that the said motion be, and the same hereby is, in all respects granted.

" *It is further ordered*, that all proceedings under or on the settlement of the cause of action made herein by the defendant, Lillian Russell, and by the said Abbey, Schoeffel & Grau, with the plaintiff, Thomas Canary and George W. Lederer, be, and the same are hereby stayed, and that all moneys received, paid, payable, or to be herein-after paid, under or by virtue of the said settlement be deposited within two days after service of a copy of this order on said A. H. Hummell and on Messrs. Olin, Rives & Montgomery, attorneys for defendant and for Abbey, Schoeffel & Grau, in the Kings County Trust

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Company, in the City of Brooklyn, and that the parties to this action and said Abbey, Schoeffel & Grau, are, and each of them is hereby directed forthwith to pay over and deposit the said moneys in the said Kings County Trust Company, within two days after a service of a copy of this order on the said A. H. Hummell and the said Olin, Rives & Montgomery.

*"It is further ordered*, that this court, at a Special Term thereof, to be held by the Justice deciding this motion, on eight days notice to the said A. H. Hummell and Olin, Rives & Montgomery, take proof of the value of the legal services rendered by said Ira Leo Bamberger to the plaintiffs and of the disbursements made or incurred by the said Ira Leo Bamberger for and in behalf of the plaintiffs.

*"It is further ordered*, in the event that the plaintiffs desire a reference to determine the value of the said legal services and the amount of said disbursements, instead of a trial by the court at Special Term, as aforesaid, and signify such desire by a notice in writing served upon the said Ira Leo Bamberger, within two days after the service of a copy of this order on the said A. H. Hummell, that it be referred to M. L. Towns, attorney and counsellor-at-law, as sole referee, to try, hear and determine the value of said legal services and the amount of said disbursements, and the said M. L. Towns, Esq., is hereby appointed sole referee to hear, try and determine the said value of the said legal services and the amount of the said disbursements, and that said reference before said referee proceed on eight days' notice.

*"It is further ordered*, that the value of the said legal services and the amount of the said disbursements, as fixed and determined by the court or the said referee, as the case may be, be paid to said Ira Leo Bamberger, out of the moneys received, paid, or payable under or by virtue of the said settlement and deposited as aforesaid, in the Kings County Trust Company and that the balance in said Trust Company remaining after the payment of the amount fixed by the court or the said referee, and of the costs and expenses of the said reference, be then and thereafter paid to the said plaintiffs or their duly authorized attorney.

"Enter,

"W. J. G."

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City of Brooklyn v. The Long Island Water Supply Co.

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*In re* CITY OF BROOKLYN v. THE LONG ISLAND  
WATER SUPPLY COMPANY.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY,  
SPECIAL TERM, DECEMBER, 1894.

§§ 3240, 3252, 3372.

*Allowance—power of Court to grant in condemnation proceedings taken  
under special Statute*

In a proceeding to condemn and take for public use the property and franchise of a corporation instituted and conducted under a special statute which does not provide for the granting of any costs or additional allowance, the court may grant an additional allowance to the property owner.

*Rennselaer & Saratoga County Bank, v. Davis* (55 N. Y., 155); *Matter of Holden* (120 N. Y., 89), distinguished and not followed.  
(Decided December 15, 1894.)

Motion by the Long Island Water Supply Co. for additional allowance.

This proceeding was taken by the City of Brooklyn to condemn and take for public use the property and franchise of the Long Island Water Supply Company, a domestic corporation organized under the Water Company's Act and having at the time of the commencement of this proceeding a contract giving it the exclusive right to supply the town of New Lots with water for the term of 25 years, from the 15th day of September, 1891. The proceeding was taken under a special act authorizing it and providing in detail with respect thereto contained in Chapter 481 of the Laws of 1892.

The Commissioners appointed in the proceeding condemning the property awarded the defendant the sum of

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City of Brooklyn v. The Long Island Water Supply Co.

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\$570,000. This award was set aside at special term before the decision of the special term was reversed upon appeal by the general term, and the decision of the general was confirmed upon appeal by the Court of Appeals. The judgment of the general term reversed the determination of the special term, providing, among other things, "that the Long Island Water Supply Company, the defendant herein, recover its costs and disbursements of this proceeding; to be taxed without prejudice to the said defendant's application hereinafter to the special term of this Court for any such allowance of costs as such defendant may by law be entitled to."

The special act under which the proceeding was taken follows in most respects the Chapter of the Code of Civil Procedure relating to condemnation proceedings, as far as and to provide in any manner respecting the rights of the parties to costs and allowances.

It does, however, provide for the compensation of the commissioners (sec. 9), at the end of section 12 provides "that all necessary expense of the proceedings herein authorized shall be paid by the Comptroller upon vouchers certified by the Commissioner of Public Works and approved by the Mayor, out of "the water sinking fund."

*Wm. C. De Witt and Thomas E. Pearsall*, for the Long Island Water Supply Co. and motion.

Under the former practice an extra allowance was not granted in condemnation proceedings. Since the adoption of the Chapter 23 of the Code of Civil Procedure, which took effect May 1, 1890 (see section 3364 of the Code), the Court is empowered in condemnation proceedings to grant an extra allowance of costs, not exceeding five per centum upon the amount awarded, section 3372 of the Code. . .

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City of Brooklyn v. The Long Island Water Supply Co.

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Since the Code now allows extra allowance in condemnation proceedings it should be granted herein, notwithstanding the special act is silent upon the question, for which has been held in the case of an act which was silent as to granting extra allowance ; that such extra allowance should be granted under the provisions of the Code providing for allowances. (See *Lowson v. Reilly*, 13 *Civ. Pro.*, 240.)

The provisions of section 3372 are to be liberally construed. (See *Matter of Lake Shore R. R. Co.*, 40 *State Rep.* 360 ; *U. S. v. Engerman*, 27 *Abb. N. C.*, 141 ; *St. Lawrence R. R. Co. v. de Camp*, 52 *State Rep.*, 10.)

*Albert G. McDonald*, corporation counsel, opposed.

Unless the provisions of the condemnation law, sections 3357-3384, Code of Civil Procedure, are applicable to this proceeding, the Court has no power to grant an allowance. The conditions upon which power is granted to the Court to grant an allowance under the condemnation law will be found in section 3372 Code of Civil Procedure.

This proceeding is not regulated by the provisions of the Code of Civil Procedure known as Condemnation Law. The condemnation was effected under chapter 481, laws of 1892. This act provides in detail for the procedure and expenses of the condemnation proceedings ; it is in itself a complete volume of procedure ; it does not by terms or implication render the provisions of the condemnation law in the Code applicable. The provisions of the Code relating to certioraries were held not applicable to certioraries issued under the act of 1880, chapter 269, to review assessments, the act providing in itself a scheme of procedure and not by express terms making the provisions of the Code applicable (*People ex rel Church v. Board of Assessors*, 106 *N. Y.*, 671).

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If the foregoing proposition be correct, the only other provision of the Code under which any contention for an allowance can be made is section 3240 Code of Civil Procedure. . . . .

An allowance may not be awarded under the provisions of 3240 of the Code of Civil Procedure (*In re Simpson*, 26 *Hun.*, 459; *In re Rensselaer v. Davis*, 55 *N. Y.*, 145).

CULLEN, J.—There can be no question that an allowance should be made to the defendant for defending the proceedings to acquire its property, provided the Court has power to make such an allowance. I think that the Court has the power.

Under Section 3240 of the Code, costs in a special proceeding where they are not specially regulated may be allowed to any party at the rates allowed for similar proceedings in an action.

In *Rensselaer & Saratoga County Bank v. Davis* (55 *N. Y.* 155), it was held that the right to grant extra allowances was confined solely to actions and could not be granted in special proceedings.

In the matter of *Holden* (126 *N. Y.* 589), that doctrine has been reiterated emphatically.

But since the time when the two decisions cited were made the Code has been altered by adding thereto the chapter called the Condemnation Law. By this addition, section 3372, the Court is expressly authorized to grant to the property-owner an additional allowance not exceeding five per cent. on the amount awarded. This change in the law has, in my judgement, abrogated the effect of these decisions, so far as it relates to proceedings to condemn land, even as to those which are not taken under the particular provisions of the law cited. The Condemnation Law is general. It was intended by it to reverse the rule announced by the Court which forbade allowances in

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such proceedings and to enact a new rule—*To wit*, the allowance of an indemnity to the land-owner for the expenses of his defense (Matter of Lake Shore R. R. Co., 48 *St. Rep.*, 290).

If costs can be awarded the respondent at all, it seems to me it should be such costs as are allowed by the Code in cases most similar to the one in hand.

This is only answered by saying that section 3240 of the Code assimilates the costs to those of actions, and that proceedings under the Condemnation Law are not actions, but special proceedings. But though commenced by petition and notice, the Code makes condemnation proceedings practically an action. Judgment is to be entered therein and provisions for the conduct of actions are made to apply to it.

I think the argument too technical which would give the respondent his costs as in an action and deny his right to an allowance as in condemnation proceedings.

Application granted. I will hear the parties as to the amount.

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ROMAINE, *et al*, APPELLANTS, *v.* BREWSTER,  
RESPONDENT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,  
NOVEMBER, 1894.

§§ 501, 3191.

*Appeal—from City Court of New York to Court of Common Pleas*  
*—counter-claim for constructive eviction in action for rent.*

A final judgment upon a decision overruling a demurrer to a counter-claim set up in an answer is unauthorized and erroneous. The only proper judgment is an interlocutory judgment and an appeal will not lie from the City Court of New York to the Court of Common Pleas.

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Romaine v. Brewster.

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In an action to recover the rent of real property, a counter-claim for damages caused by the untenable condition of the premises is not properly pleaded where there is not an allegation of a covenant in the lease for quiet enjoyment. The cause of action pleaded as a counter-claim in the absence of such allegation being *ex delicto*, and not arising out of the contract or transaction set forth in the complaint—i. e., the lease, when connected with the subject of the action—the rent reserved.

(Decided November 5, 1894.)

Appeal by the plaintiff from a final judgment of the general term of the City Court of New York reversing a judgment of the special term sustaining a demurrer to the defendant's counter-claim.

The facts appear in the opinion.

*Herman W. Schmitz*, for plaintiffs, appellant.

*E. Lawrence Godkin*, for defendant, respondent.

BISCHOFF, J.—To an action upon his covenant to pay rent under a lease of an apartment in the plaintiffs' apartment house, the defendant, besides pleading his eviction from and abandonment of the demised premises before the accrument of the installments of rent sued for, interposed a counter-claim for damages alleged to have resulted from the eviction. The plaintiffs demurred to the counter-claim on the ground that it did not arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiffs' claim, and was not connected with the subject of the action. (*Code Civ. Pro.*, § 501, *subd.*, 1).

At special term of the Court below the demurrer was sustained, but at general term the defendant had judgment for reversal, with costs against the plaintiffs, and from that judgment the plaintiffs have appealed to this Court.

The judgment under review awards costs against the plaintiffs, payment whereof may be enforced by execution. It is final in form, and so appealable to us. A final judgment, however, upon a decision overruling a demurrer, is



unauthorized and erroneous. It must therefore be reversed, and the parties should cause the proper judgment to be entered in the Court below. The only proper judgment is an interlocutory judgment, and from it no appeal will lie to this Court. (*Biershenk v. Stokes*, 18 *N. Y. Supp.* 854).

It may perhaps be to the advantage of the litigants here to say that the decision at general term of the Court below was error. The allegations of the answer respecting the counter-claim nowhere make mention of a covenant of quiet enjoyment, expressed or implied, as having been entered into by the plaintiffs, nor is any breach of any such covenant assigned as the foundation of the counter-claim. The answer admits the execution and delivery of the lease mentioned in and annexed to the complaint, and then, in substance, alleges that the plaintiffs, owing to their neglect to keep the part of the building of which they retained possession and control in a proper condition and state of repair, had caused a nuisance to be created and maintained on the premises, whereby the apartment leased to the defendant became untenable, and he was compelled to remove therefrom (*Bradley v. De Goicouria*, 12 *Daly*, 393; *Tallman v. Murphy*, 120 *N. Y.*, 351, 24 *N. E.*, 716; *Tallman v. Earle*, 3 *Misc. Rep.*, 76, 23 *N. Y. Supp.*, 17; *Duff v. Hart*, (*Com. Pl. N. Y.*) 16 *N. Y. Supp.*, 163.) In the absence, therefore, of allegations essential to a cause of action *ex contractu*, it must be assumed that the cause of action intended to be asserted is *ex delicto*, the allegations being sufficient for that purpose. Treating the counter-claim as *ex delicto*, it cannot be said to have arisen out of the contract or transaction set forth in the complaint—*i. e.*, the lease. Nor is it connected with the subject of the action—the rent reserved. (*Edgerton v. Page*, 20 *N. Y.* 281, 285). The judgment should be reversed, with costs.

BOOKSTAVEN, P.J., AND PRYOR, J., concurred.

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Stillwater v. Stillwater.

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STILLWATER, APPELLANT, v. STILLWATER,  
RESPONDENT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,  
OCTOBER, 1894.

§§ 723, 724, 738.

*Offer of judgment—power of court to amend after acceptance.*

After an offer of judgment has been made and accepted and the judgment entered thereon paid, the Court cannot open the judgment and permit an amendment of the offer. The offer and its acceptance constitute a contract which the Court cannot on motion set aside or change without the consent of both parties.

(Decided October 26, 1894.)

Appeal by the plaintiff from an order of the special term amending an offer of judgment made by the defendant and accepted by the plaintiff.

The facts are stated in the opinion.

*R. E. and A. J. Prime & Burns*, for plaintiff,  
appellant.

*John F. Brennan*, for defendant, respondent.

DYKMAN, J.—This is an appeal from an order amending the defendant's offer of judgment, and the judgment entered on such offer, and the acceptance thereof. The complaint in the action alleges that in June, 1875, the grandfather of the plaintiff deposited in the Yonkers Savings Bank \$1,500, in the name of Benjamin W. Stillwell, in trust for James M. Stillwell, the plaintiff, and delivered the bank book to the defendant, in trust for the plaintiff; and the defendant agreed to hold the book, money, funds, and accumulations for the plaintiff, and the understanding

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was that the money was to constitute a fund whereby the plaintiff would be enabled to build on lands which the grandfather would thereafter give to the plaintiff, and that the principal and accumulations of interest should be paid to the plaintiff when he should arrive at full age; that the plaintiff did arrive at full age on the 8th day of February, 1893; and that thereafter the plaintiff requested and also demanded the money from the defendant, and he refused to pay it over. This suit was then commenced, and the defendant answered on May 24, 1893, and the next day served a written offer to allow judgment against him for \$3,252.60, and interest at 4 per cent. and costs, which offer was accepted the same day. Judgment was entered on the offer and acceptance. The defendant, after the acceptance of the first offer, discovered what he claims was a mistake, and served a second offer for \$100 less than the first, claiming a mistake in that amount, with notice of withdrawal of the first offer. Plaintiff's attorney then served a notice that the first offer, having been accepted, could not be withdrawn, and calling upon the attorney for the defendant to move promptly for the relief to which he might deem himself entitled. The defendant did not move, and the plaintiff then made a motion at the special term; and, after hearing thereat, an order was made setting aside the service of the first offer, unless the plaintiff should stipulate to reduce the judgment by \$100, and granting costs of motion to the plaintiff. The stipulation to reduce the judgment was made and filed. The defendant paid the judgment June 3, 1893, and, in July thereafter, claims to have discovered this mistake in the offer, but made no motion to correct it or to obtain any relief until the middle of December, 1893, and then made a motion at the special term to amend the offer and judgment so as to reduce the amount \$200, besides the \$100 deducted by the stipulation already mentioned, and such

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*Sebring v. Stryker.*

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an order was made. The plaintiff has appealed from that order, and, in our view, it was erroneous.

The offer and acceptance constituted a contract which the court could not set aside on motion. It was equally powerless to order or frame an amendment that would operate to change a contract, without the consent of both parties. The contract made by the offer and acceptance by the parties required the agreement of both parties to make it effectual. The contract became executed when, in the month of June, 1893, the judgment upon the offer and acceptance was fully paid and satisfied. It is unnecessary to decide here what course should have been pursued on the part of the defendant in case an error had crept into his offer, but the order of the special term compelled the defendant to deduct \$200, besides the \$100 deducted by the stipulation which the plaintiff made—that is plainly erroneous, and the order should be reversed with \$10 costs and disbursements.

BROWN, P. J., AND CULLEN J., concurred.

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SEBRING, RESPONDENT *v.* STRYKER, APPELLANT.

COUNTY COURT OF STEUBEN COUNTY, NOVEMBER, 1894.

§§ 426, 869, 2878, 2969.

*Service of summons—privilege of witness—evidence as to testimony in another action.*

A person who is served as an officer of a corporation with a subpoena *duces tecum*, and who, in compliance therewith, comes into jurisdiction of a Justice's court without his county, for the purpose of producing books and identifying, is privileged from service of a summons issued out of such Justice's court, notwithstanding he

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could have obeyed the subpoena by sending the books into the county by the hand of a subordinate officer or employee.

A person who is privileged from the service of a summons while within the jurisdiction of a court, because he came there in obedience to a subpoena *duces tecum*, issued in an action triable within the county, may waive the objection to the service made in violation of such privilege, and he does so when he fails to object on the return day named in the summons and the service thereof, but instead comes to trial and denies the objection is upon appeal from a judgment rendered in the action.

*Day v. Harris* (20 *Cir. Pro.*, 225), *Sanders v. Harris* (20 *Cir. Pro.*, 258), *Protsch v. Schlicht* (2 *N. Y. St. Rep.*, 871) followed.

Testimony given by a party or witness upon the trial of an action may be proven upon the trial of another action by a witness who heard it, and who can give the substance thereof. It is not necessary to prove it by the minutes of the court, nor that the witness should be able to testify to the exact language.

In reviewing proceedings of justices of the peace the courts regard them with marked indulgence and liberality, and if possible sustain them by every reasonable and warranted intendment.

{*Decided November 5, 1894.*

Appeal by the defendant from judgment of the county court of Steuben County rendered in favor of the plaintiff.

The facts are stated in the opinion.

*Richard N. Thurston*, for defendant, appellant,

*James O. Sebring*, for plaintiff, respondent.

ROBINSON, J.—This is an appeal from a judgment rendered by a justice of the peace upon default of the defendant. Affidavits and the return of the justice show that the summons was served upon the defendant while he was in attendance at a court of the said justice as a witness in a case then being tried. A subpoena, *duces tecum*, had been served on him in Chemung county, requiring the production of certain books of the Columbian Knights, a corporation of which he was an officer. The defendant was a resident of Onondaga county.

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*Sebring v. Stryker.*

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It is claimed that the testimony given on the trial does not establish a cause of action, because the witness testified to the substance of what defendant testified on the trial of another action, according to the best of his recollection. The plaintiff had the right to prove the admissions of defendant made under oath, and it was not necessary to produce and prove it by the minutes of the court. (*Pickard v. Collins*, 23 *Barb.*, 444.)

"It is not necessary that the witness should be able to testify to the exact language, but he must be able to give the substance. He may state the impression on his mind as to the fact of what he said, but not what he understood to be meant by what he testifies was said." (*Abb. Tr. Brief*, § 67, and cases cited.)

"It has been the uniform practice of the courts, in reviewing the proceedings had before justices of the peace, to regard them with marked indulgence and liberality, and, if possible, sustain them by every reasonable and warrantable intendment." (*Schoonmaker v. Spencer*, 54 *N. Y.*, 366, 370; *Knight v. Wilson*, 55 *Hun.*, 559; *Beecher v. Kendall*, 14 *Hun.*, 329.)

The judgment should be affirmed.

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NOTE ON EXEMPTION OF WITNESS FROM ARREST AND FROM SERVICE  
OF PROCESS.

**Exempt from Arrest.**—A resident witness, while attending examination, is exempt from arrest, but not from service of process. Non-residents are exempt from both. (*Frisbie v. Young*, 11 *Hun.*, 474; *Jenkins v. Smith*, 57 *How.*, 171; *Code of Civil Procedure*, §§ 860, 863.)

This privilege extends to a non-resident. (*Merrill v. George*, 23 *How. Pr.*, 331; *Seaver v. Robinson*, 3 *Duer*, 622; 12 *N. Y. Leg. Obs.*, 120.)

**Exempt from Service of Process.**—Witnesses are entitled to immunity from the service of civil process for the commencement of actions while attending our courts for the purpose of testifying either on the trial of the action in the court, or *de bene esse* before a referee or notary, and this exemption extends to parties, and applies where

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the witness is a director of a foreign corporation, and the action in which he is sought to be served is one against said corporation. (*Marks v. LaSociété Anonyme* (22 *Civ. Pro. R.*, 201; 19 *N. Y. Supp.*, 470; 46 *State Rep.*, 660 *C. P.*)

Where a summons was served upon a resident of another state while attending in this state in good faith as a witness—*Held*, that an order setting aside the summons was proper. The immunity of such a witness from the service of civil process is absolute, *cundo morando, et redeundo*. (*Person v. Grier* 66 *N. Y.*, 124, *aff'g*, 6 *Hun.*, 477; *Lambkin v. Starkey*, 7 *Hun.*, 479; *Seaver v. Robinson* 3 *Duer.* 622; *Brett v. Brown* 13 *Abb. N. S.*, 295; *Grafton v. Weeks* 7 *Daly*, 523; *Jenkins v. Smith*, 57 *How Pr.*, 171.)

Unnecessary delay waives right to exemption. (19 *N. Y. Supp.*, 470; 46 *State Rep.*, 660; 22 *Civ Pro.*, *P.* 201.)

To entitle a foreign party or witness to a judicial proceeding to exemption from service of process, it must appear that he came from without the jurisdiction upon the occasion of the proceeding which he was attending. (*Day v. Harris*, 37 *N. Y. St. Rep.*, 322.)

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MORRIS C. MENGIS, RESPONDENT, v. THE FIFTH  
AVENUE RAILWAY COMPANY AND AL-  
FREDERICK S. HATCH, APPELLANTS;  
IMPLEADED WITH LEWIS MAY,  
WILLIAM H. LEE, AND  
ISAAC B. NEW-  
COMBE.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,  
NOVEMBER, 1894.

§ 1207.

*Judgment not more favorable than complaint demands—best proof of written resolution of Board of Directors is the resolution itself.*

Under section 1207 of the Code of Civil Procedure, permitting the plaintiff, where an answer has been served, to take any judgment consistent with the case made by the complaint and embraced within the issue—*Held*, that the facts established upon the reference, and so found by the referee, were consistent with

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the allegations of complaint and answer, and judgment was properly granted thereon.

When upon the trial the defendant corporation by its counsel offered to prove the substance of a written resolution of its board of directors, and, on objection by plaintiff's counsel, the referee ruled that the offer was improper, and that the defendant should offer the resolution itself, and in case it was rejected, have it marked for identification—*Held*, that the referee was correct in refusing to rule upon the offer. The resolution was in writing, and was the best evidence of itself, and if offered and rejected should have been marked for identification and incorporated in the case on appeal, so that the appellants' court could determine as to its competency.

Where an agreement between two contracting parties absolves each from liability to the other for breach of the contract, in case it becomes impossible of fulfillment, such agreement does not include moneys paid on account by one to the other for the carrying out of the purposes of the contract, and still unexpended. Such moneys may be recovered back by the party who originally paid them over.

(Decided November, 1894.)

Appeal by the defendants, The Fifth Avenue Railway Company and another, from portions of a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 27th day of February, 1894, upon the report of a referee, directing the transfer of certain bonds and the payment of certain moneys to the plaintiff.

In 1885 the Fifth Avenue Railway Company was incorporated under the laws of this State, with an authorized capital stock of \$2,500,000, divided into shares of one hundred dollars each, for the purpose of constructing and operating a surface railroad in Fifth avenue and in other streets in the city of New York. A contract in writing was entered into between the plaintiff and the corporation on the 15th of September, 1885, which was modified by a written contract entered into between the parties October 30th, 1885, by which the plaintiff agreed to construct the road of the corporation for \$2,636,000 of its stock and



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\$1,000,000 of its first mortgage bonds. The contract contains the following, among other provisions:

“That he (Morris C. Mengis) will promptly proceed to obtain, by his own cost, all rights of way and necessary consents from the proper authorities and the property holders along the line of said railroad, and will in all respects comply with the legal requirements as to securing such rights and consents, and all provisions of law as to the building and completing of said road. . . .

“The party of the first part (Mengis) will, until the completion of said road, defray the current administrative expenses of said party of the second part (corporation) incident to its proper management, including salaries, office rent, employment of counsel, legal expenses, stationery, cost of printing securities, and all other ordinary expenses of such a corporation, but not exceeding in all the sum of twenty thousand dollars per annum. . . .

“While this contract shall remain in force the said party of the second part (corporation) will not issue or agree to issue to any person or persons or company, or for any purpose whatever, any stock or bonds or other securities in addition to the stock and bonds hereby agreed to be issued to the said party of the first part (Mengis), excepting the one hundred and forty shares of said capital stock now subscribed for, unless otherwise first agreed to by the party hereto of the first part (Mengis) in writing, and except that said party of the second part (corporation) may issue the five hundred shares of stock reserved in the treasury at any time after the payment of the first installment has been made to said party of the first part (Mengis) as herein provided, nor shall said capital stock be increased without the like consent of the said party of the first part (Mengis). . . .

“That in case said party of the first part (Mengis) shall fail to obtain the necessary rights, privileges and

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authority, and shall fail to build and complete said road within five years from the date hereof, then the said party of the second part (corporation) shall have the right and option to cancel this agreement, and thereupon both parties shall be absolved from any liability thereuuder to one another." . . . .

The construction of the corporation's road has never been authorized, and no part of it has been built. The defendant Alfrederick S. Hatch has been a director of the corporation since its organization, and in September, 1885, the plaintiff entered into an arrangement with him by which he agreed to act as trustee for the plaintiff. Shortly afterwards the plaintiff sold to various person options to subscribe at par for a portion of the stock of the railway, to which the plaintiff would become entitled under the terms of the contract. The sums received upon the sale of these options were deposited by the plaintiff with the defendant, Hatch, who was then a member of the banking firm of A. S. Hatch & Co. The defendant, Hatch, opened an account with the firm of A. S. Hatch & Co., in the name of "A. S. Hatch, in trust for M. C. Mengis." Between September 15, 1885, and November 17, 1885, the plaintiff received from the sale of privileges for the purchase of shares \$10,950, which he turned over to Hatch, who deposited it to the credit of said account.

In October, 1885, the plaintiff authorized Hatch to pay to the corporation \$5,000 and charge it to the said account, which was paid October 8, 1885.

On the 17th of November, 1885, the plaintiff authorized the corporation to sell the right to purchase such shares as he might become entitled to, at the rate of ten dollars per share, and deposit the sums received with the defendant, Hatch. Acting upon this authority the corporation sold the right to subscribe for a certain number of shares, realizing \$13,320, which was credited to the trust

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account, thus making the total sum credited to said account and arising from the sale of privileges \$24,270. From this sum Hatch paid to the plaintiff \$13,760, leaving \$10,510 to the credit of the account. February 6th, 1886, Hatch, as trustee, by the authority of the plaintiff, paid to the corporation from said account \$5,000, and February 8th, 1886, a further sum of \$5,000, leaving still to the credit of the account \$510. On the 28th of June, 1886, Hatch, who was then treasurer of the defendant, purchased with the money so received from the plaintiff nine bonds of the par value of \$1,000 each, for which he paid \$9,993.75, and had them registered in the names of himself and of defendant, William H. Lee, as trustees, which left in the hands of the defendant, Hatch, \$6.25. Hatch received the interest paid on the bonds from time to time, amounting to \$810, which, with the \$6.25, stood to the credit of the corporation with the firm of A. S. Hatch & Co.

In 1887 the defendant, Hatch, made an assignment for the benefit of his creditors; but prior to the execution thereof he transferred said nine bonds to Isaac B. Newcombe and William H. Lee, in whose names they were registered as trustees. Between January 1st and April 23d, 1890, Newcombe and Lee sold three of the bonds and paid the proceeds arising from the sale to the corporation. Thereafter, and before the trial of this action, Newcombe and Lee received interest upon the bonds amounting to \$1,980, of which they paid \$1,107.69 to the corporation, leaving in their hands \$872.31. For a long time before this action was begun the plaintiff and the corporation have treated the construction agreement as abandoned.

This action was brought to recover the bonds held by the trustees, Newcombe and Lee, the \$872.31 in their hands, the \$510 in the hands of Hatch, and the amount in the hands of the corporation. By the first clause in the

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judgment, the defendants, Newcombe and Lee, are ordered to assign six of the mortgage bonds to the plaintiff. By the second clause in the judgment, the defendants, Newcombe and Lee, are ordered to pay to the plaintiff \$872.31 and all other sums which they may have received as interest on the bonds after deducting the costs in this action of May, Lee and Newcombe. By the third clause the plaintiff recovers of Hatch \$510, and by the fourth clause he recovers of the corporation \$816.25

*Lewis L. Delafield*, for plaintiff, respondent.

*James J. Allen*, for defendant, appellant.

FOLLETT, J.—The corporation appeals from the first, second and fourth clauses of the judgment, and Alfrederick S. Hatch from the third clause thereof. No other defendant appeals. The corporation urges that the judgment against it is not “consistent with the case made by the complaint and embraced within the issue,” as required by section 1207 of the Code of Civil Procedure.\* The construction contract of September 15, 1885, the contract amendatory thereof of October 30, 1885, and the contract of November 17, 1885, by which the corporation was authorized and undertook to sell options to purchase shares

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\* The demand for relief is given controlling effect but in one instance, namely, when there is no answer. The judgment must then be restricted to what is asked for in the complaint, but if an answer is interposed, the court grants any relief within the case shown by the complaint, and embraced in the issues. (*Dusenbury v. Dusenbury*, 4 *Civ. Pro. R.*, 126.)

If defendant answers, the demand of relief becomes immaterial. (*Marquat v. Marquat*, 12 *N. Y.*, 336; *Emery v. Pease*, 20 *N. Y.*, 62; *Redfield v. Frear*, 9 *Abb. N. S.*, 449, 452; *Caswell v. West*, 3 *T. & C.*, 383.)

Where there is an answer, the court is to give such relief as the parties are entitled to, whether demanded in the complaint or not. (*Jones v. Butler*, 20 *How.*, 189; *S. C.*, 30 *Barb.*, 641; *Armitage v. Pulver*, 37 *N. Y.*, 494; See *v. Partridge*, 2 *Duer*, 463.)

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which the plaintiff was to become entitled to receive under his contract, are set forth in the complaint. It is also alleged that the corporation sold options to purchase many shares of stock, and received a large sum of money in cash which was paid over to Lewis May and Alfrederick S. Hatch, pursuant to the terms of the contract of November 17, 1885; which fund was subsequently transferred to Lee and Newcombe, who were directors of the corporation. It is also alleged that the plaintiff is ignorant of the amount received for options so sold, and that all of the defendants are liable to account for and pay to the plaintiff the moneys received by them. The corporation alleges in its answer that it was agreed that the construction contract was not to be delivered to the plaintiff until \$10,000 were paid over to it, to be expended in payment of the administrative expenses referred to in the contract; but that afterwards, on the 8th of October, 1885, a resolution was adopted by the defendants' directors that the contract be delivered to the plaintiff upon the payment by him of \$5,000, and on receiving an agreement from him that half of any money thereafter received for the sale of options should be paid to the treasurer of the corporation until \$10,000 should have been fully paid. That, thereafter, plaintiff paid to the treasurer of the corporation \$10,000 received from the sale of options. It also alleges that it has expended more than the sum of \$10,000 in paying the expenses of administering the affairs of the corporation. Other defenses are set up which were not established before the referee, and which need not be referred to. Upon the application of the plaintiff, the corporation was required to furnish a bill of particulars of the sums which it had paid out in administering the affairs of the corporation, which it refused to serve, and, by an order of the court, was precluded from giving evidence of the various items expended. Under this state of the pleadings, it seems very clear that the

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issue as to how much the corporation had received and how much of the sum remained unexpended and in its hands or in the hands of its officers or of the trustees, was clearly presented, and that the recovery against it was consistent with the case made by the complaint and embraced within the issue. Besides, the evidence of the amount of money and bonds in the possession, or under the control, of the corporation was not objected to on the ground that it was not relevant to any issue raised by the pleadings. The only objection that evidence offered by the plaintiff was inadmissible, under the pleadings, is found at folio 442, and relates to a violation by the corporation of its agreement not to sell shares without the consent of the plaintiff.

On the trial, the corporation by its counsel offered to prove the substance of the resolution of its board of directors, adopted on the 12th of September, 1885. This was objected to by the plaintiff's counsel, and the referee ruled that the offer was improper and that the defendant should offer the resolution and have it marked for identification, in case it was rejected. The resolution was not produced, and the referee was quite right in refusing to rule upon the offer. The resolution was concededly in writing, and if the defendant desired to offer it in evidence it should have produced it, and, if rejected, should have had it marked for identification and incorporated in the case, so that the appellate court could determine whether it was competent.

By the sixteenth finding, it is found that the \$5,000 paid by Hatch, from the trust account to the treasurer of the corporation, was for the sole purpose of securing the payment, by the plaintiff, of the administrative and other expenses which he was required to pay by the terms of his contract. It is urged that this finding is contrary to the weight of evidence. Over this issue there was a sharp

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conflict in the evidence, and we think that the finding of the referee is amply sustained by the testimony, and that the finding that this sum was paid to the corporation as a bonus for awarding the contract to the plaintiff has little support in the evidence. The sixteenth finding being well founded, the fifth conclusion of law, that such part of the \$5,000 as was not expended by the corporation in the payment of administrative expenses belongs to the plaintiff, necessarily follows. The referee found (third finding of fact) that it was provided by the construction agreement, that should the plaintiff fail to build the road within five years, the corporation should have the right to cancel the contract and thereupon both parties should be absolved from any liability thereunder to each other, and he also found that for some years both parties to the contract had treated the construction agreement as abandoned. It is urged that these findings are destructive of the right of the plaintiff to require the defendant to account for sums of money which it had received from him, but had not expended, pursuant to the terms under which they were received. This provision relates to the executory parts of the construction contract, and not to moneys received by the corporation under the contract of November 17, 1885. There is no provision in the contract that, in case the plaintiff paid into the hands of the corporation a larger sum than was necessary for the payment of administrative expenses, he should forfeit them in case the construction of the road should become impossible by reason of the refusal of the authorities of the city to grant permission for its construction, and there is nothing in these findings inconsistent with the right to recover from the corporation the sums of money which he had paid over to it and which it had not expended pursuant to the contracts.

The appeal, on the part of Hatch, is based upon the refusal of the referee to find that he had rendered services

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to the plaintiff equal in value to the sum of \$510, retained by him, and for which a judgment was recovered. The referee found that the plaintiff agreed to pay Hatch a reasonable compensation for his services as trustee, but that the reasonable value of such services, over and above the value of an option given by the plaintiff to Hatch, did not appear from the evidence. Hatch ceased to be a trustee in 1887, and we think that the refusal of the referee to find that the services rendered by him previous to that date were of greater value than the option given him and the profits derived from the use of the deposits in his hands and in the hands of the firm, was justified by the evidence.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., and O'BRIEN, J., concurred.

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**Pleadings and Proofs Considered Jointly.**—If there is a contest, the court may give any appropriate relief within the frame of the action, according to the pleadings and proofs. (*Durand v. Hankerson*, 39 N. Y., 287; *Marquat v. Marquat*, 12 N. Y., 336; reversing 7 *How.*, 417.—See *Towle v. Jones*, 1 *Rob.*, 87; *Ryder v. Jenny*, 2 *Rob.*, 56.)

**Whether legal or equitable.**—If the complaint states a cause of action, and defendant answers, the court should afford appropriate relief whether the frame of the complaint be legal or equitable. (*Wright v. Wright*, 54 N. Y., 437, *aff'g* 59 *Barb.*, 505; *Mills v. Bliss*, 55 N. Y., 139.)

But see 15 *Abb. N. S.*, 171: A divorce case in which it was held that "relief is limited by the pleadings, though the proofs may show plaintiff entitled to a different remedy."

**Judgment confined to cause of action pleaded.**—The statute which permits relief not within the demand of the complaint, in case an answer is interposed, limits the relief to that consistent with the case made by the complaint. (*Evans v. Burton*, 5 *State Rep.*, 216; S. C., 42 *Hun.*, 652.)

A party must allege, as well as prove, the facts constituting his cause of action, and a recovery upon a cause of action, not alleged in the complaint, although proved under objection and exception on the



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trial, is not sustainable. (*Clark v. Post*, 113 *N. Y.*, 17; *S. C.*, 21 *N. Y.*, *St. Rep.*, 885, reversing 45 *Hun.*, 265; *S. C.*, 10 *State Rep.*, 425.)

If plaintiff is to recover, it must be upon the case, as it is substantially embodied in the complaint; and if defendant can succeed in defeating what, otherwise, appears to be a legal and valid claim, it must be upon some denial or defense alleged in the answer: neither party can derive any advantage from evidence appearing upon the trial tending to establish the existence of a cause of action or defense not included in his pleadings. (*Hall v. U. S. Reflector Co.*, 18 *Week. Dig.*, 7)

Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle plaintiff, whether legal or equitable, and so the complaint may be framed with a double aspect, yet plaintiff can have no relief that is not "consistent with the case made by his complaint and within the issue." Plaintiff therefore, must establish the allegations, and, if they warrant legal relief only, he cannot have equitable relief upon the evidence. (*Stevens v. Mayor*, 84 *N. Y.*, 296.)

Compare the foregoing with the rule stated in *Simson v. Chadwick*, 20 *Week. Dig.*, 35: "Relief will be granted, although not asked for in terms by the complaint, when it is clearly equitable and within the power of the court."

For cases, where the question is considered incidentally, see 49 *St. Rep.*, 588; 51 *St. Rep.*, 594; 54 *St. Rep.*, 270; 21 *N. Y. Supp.*, 257; 22 *N. Y. Supp.*, 394.

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SMITH, RESPONDENT, v. WESTON, IMPLEADED, ETC.,  
APPELLANTS.

SUPREME COURT, FIFTH ' DEPARTMENT, GENERAL TERM,  
OCTOBER, 1894.

§§ 456, 724.

*Opening default, when excusable—estoppel—judgment.*

A defendant is not estopped from asking to have a default opened, and for leave to set up a meritorious defense, unless plaintiff will be prejudiced thereby.

In such a case the default was held to be sufficiently excused to justify opening the judgment.

(Decided October, 1894.)

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Smith v. Weston.

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Appeal by the defendant from an order denying a motion to set aside a judgment taken by default, and for leave to answer.

The facts are stated in the opinion.

*J. H. Waring*, for defendant, appellant.

*C. S. Cary*, for plaintiff, respondent.

DWIGHT, P. J.—The action was to charge the defendants, William W. Weston, Orren Weston and Abijah Weston, as indorsers of a promissory note of \$2,000, made by the firm of George Van Campen & Sons, payable to the order of J. K. Van Campen, and bearing, besides the indorsement of the payee, an indorsement in the firm name of "Weston Brothers." The complaint alleged that the firm so named was a co-partnership consisting of the three defendants; that they indorsed the note in their firm name, and that it was afterwards, and before maturity, duly transferred to the plaintiff, for value. All the defendants were personally served in the action about the 1st of February, 1893. The defendant, Abijah, alone answered the complaint. He denied that the indorsement in question was made by or for the firm of Weston Bros., but alleged that it was made by the defendant William W. after the dissolution of the firm, and without the knowledge or consent of the defendant answering; that it was not made in the business of the firm, but solely for the accommodation of the makers of the note; and that the plaintiff took the note with notice of all those facts. On the trial of the issues thus joined the facts above stated were proved without contradiction, and a verdict was directed for the defendant, Abijah, and judgment was entered dismissing the complaint as to him. Immediately after the entry of

that judgment the plaintiff caused judgment for the amount of the note to be entered as by default against the defendant William W. Weston and this appellant, and it is from the denial of the motion of the latter to open the default as to him, that this appeal was taken.

The papers on this appeal show the same defence existing in favor of this appellant as that which has been established in favor of the defendant, Abijah. That defence is ample and highly meritorious. The indorsement by William was a fraud on the other defendants, and knowledge that it was made outside the business of the firm, and after its dissolution, charged the plaintiff with notice of the want of authority to make it, and with complicity in the fraud involved. (*Gansevoort v. Williams*, 14 *Wend.*, 138.) In such a case the law will not lend its aid to the enforcement of the claim, even as punishment for neglect to answer, if such neglect can be reasonably excused, consistently with good faith, on the part of the defendant. The statute expressly provides for opening defaults which are suffered through excusable neglect. *Code Civ. Pro.*, § 724. The excuse of the defendant here for not answering was that he was assured by his brother, William, that part of the note was paid already, and that the rest would be paid before judgment could be taken against him, and that he relied implicitly upon such assurance. We have no doubt that this excuse would have been deemed by the court at special term sufficient to justify the granting of the motion, but for a contention which seems to have been made on the part of the plaintiff, to the effect that the defendant is precluded by something in the nature of an estoppel from now making a defence in the action. The contention is based upon the alleged fact that at the time the default was suffered by the two defendants, the defendant, William, whose liability is unquestioned, was responsible, and that if a judgment had

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been taken against him at that time it could have been collected; but that, relying upon the judgment to result from the default of the defendant Orren, the plaintiff omitted to apply for the judgment which might have been obtained against William, and that since that time the latter has become irresponsible, and that the judgment now obtained against him is of no avail. The most obvious answer to this contention is, that the plaintiff could not have judgment against either of the joint defendants in default until the issues joined by the answer of the other joint defendant or defendants should be disposed of. It is only when the liability of the defendants in several, and the contract, though in form joint, is shown to bind only one—or less than all—of the parties sought to be charged, that judgment may be taken against those of the defendants who are in default, and the action be severed, and proceed against those who have answered. (*Code Civ. Pro.*, § 456; *Brumskill v. James*, 11 *N. Y.*, 294; *Pruyn v. Black*, 21 *N. Y.*, 300.) This rule is perfectly well understood, and is not questioned by counsel for the plaintiff: But he urges that the issues in this action could have been disposed of, if Orren had answered with Abijah, without the necessity of a trial, viz., by the plaintiff's going into court and admitting the truth of the answer interposed, and consenting to judgment dismissing his complaint as to the defendants answering; and that thereupon he would have been entitled to enter judgment in his own favor against the defendant, William. The proposition is a novel one, there being, so far as we know, no precedent for such a confession of judgment by the plaintiff in an action for any purpose; but we are not disposed to argue that it might not be done, or that the court might not thereupon give leave to enter judgment against the defendant in default. But the trouble with the plaintiff's contention is that there is no evidence or reason to suppose that this

course would have been pursued by the plaintiff, and the probabilities are to the contrary. The plaintiff has never admitted the truth of the defence in question, but, on the contrary, has contested it with the defendant, Abijah, and put him to the proof of it before a jury, and has entered a judgment against this appellant which ignores the existence of any such defence. The mere possibility of his admitting the truth of that defense, involving as it did his own complicity in the attempt of William to defraud his brothers by the unlawful use of the late firm name, with the effect of releasing two perfectly responsible defendants in order that he might obtain a judgment against a defendant of at least very doubtful responsibility, was too remote and contingent to form the basis of an estoppel against this defendant. Before the defendant can be held to be estopped from now setting up his meritorious defense against the unjust demand of the plaintiff, it should appear that the plaintiff has been prejudiced by the loss of some substantial advantage which would have been his had that defense been interposed within the time prescribed by law. But there is the further answer to the plaintiff's contention arising from the proofs bearing upon the question of William's responsibility at the time when this default occurred. We think the balance of proof is distinctly opposed to the theory that property of the defendant, William, would have been found out of which to satisfy an execution issued on any judgment which might have been obtained against him, after the expiration of the time of the appellant to answer herein. We think the default of the appellant was reasonably excused, and that no injustice is liable to be done by opening that default, and permitting the appellant to answer as proposed, unless it may be by a possible augmentation of costs against the plaintiff, which may be provided against by the order here. If the defendant, Orren, had joined in the answer of his brother,

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Abijah, or had answered separately to the same effect in time, there would have been but one trial of the issues joined by both. Now, if the plaintiff still contests the defense, a second trial is necessitated. The order opening the default should therefore provide that, in case of a recovery by the defendant, his judgment shall be without costs of the action, after notice of the trial; and, further, that if the plaintiff elect to discontinue the action he may do so without payment of costs.

All concur.

Order appealed from reversed, and the motion granted on the terms above stated, without costs of this appeal to either party.

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THE PEOPLE *v.* THOMAS G. COWAN, PRINCIPAL,  
AND JOHN CAHILL, SURETY.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM.  
NOVEMBER, 1894.

§§ 421, 2458.

*Appearance—supplementary proceedings.*

Proceedings Supplementary to execution cannot be founded upon a judgment entered upon a forfeited recognizance without action.  
(Decided November, 1894.)

Motion made to vacate an order for examination of judgment debtor.

The facts are stated in the opinion.

*Durnin & Hendrick*, for defendant and motion.

*John R. Fellows and F. J. Hennesy*, opposed.

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GIEGERICH, J.—The defendant, gave a recognizance to answer to a charge preferred. Upon the principal's failure to appear, the same was declared forfeited and an order to that effect was entered, and thereafter judgment was entered in the office of the clerk of the city and county of New York by the filing of the recognizance in question, together with a certified copy of the order of the court forfeiting the same. An execution was then issued to the sheriff, who returned the same unsatisfied, and an order for the examination of the defendant, Cahill, in proceedings supplementary to execution was obtained. The latter now moves to vacate the same upon the ground that the judgment was not rendered upon the defendant's appearance, or personal service of the summons upon him, In order to entitle a judgment creditor to maintain supplementary proceedings "the judgment must have been rendered upon the judgment debtor's appearance or personal service of the summons upon him." *Code Civ. Pro.*, § 2458. It is undisputed that neither of the defendants were served with the summons, and that no action was brought upon the said recognizance. The district attorney contends that the provisions of the Code above cited are inapplicable, and cites numerous authorities in support of his contention; but they are not in point, the same relating merely to the right of the People to enter judgment upon a forfeited recognizance without bringing an action, and to issue execution thereon. It is also urged that the signing of the recognizance was "a waiver by the defendants of the right to any further day in court." Conceding this to be so, still I do not perceive how the mere signing of such a recognizance can be construed into an appearance by the defendants in the proceeding in which the judgment was entered, and of which, it is conceded, neither of them had any notice. "The defendant's appearance must be made by serving upon the plaintiff's attorney within twenty days

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after service of the summons, exclusive of the day of service, a notice of appearance or a copy of a demurrer or of an answer." *Code Civ. Pro.*, § 421. It is manifest from the papers submitted that there were no appearance within the purview of the provisions above quoted by either of the defendants in the proceeding referred to. There having been neither an appearance by nor personal service of the summons upon the defendants, it follows that the order in question must be vacated.

The district attorney also urges that any other view of the position than is contended for "would be to seriously affect the administration of the criminal law." While such a result is to be deplored, still it should be borne in mind that it is for the courts to apply the laws, not to make them, and that it is for the legislature to afford the remedy.

Motion granted.

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COLBY, RESPONDENT, v. COLBY, GUARDIAN, ETC.,  
IMPLEADED, ETC. APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,  
OCTOBER, 1894.

§§ 1866, 1867.

*Wills—establishment and probate of—Specific performance.*

Chapter 316 of the Laws of 1879, providing for the establishment and probate of wills in the Supreme Court, was repealed by sections 1866 and 1867 of the Code of Civil Procedure.

While an agreement to make a certain disposition of property by a last will is not, strictly speaking, capable of a specific execution, yet it is within the jurisdiction of equity to do its equivalent and require those upon whom the legal title has descended to convey the property in accordance with its terms.

(Decided October, 1894.)



Appeal from an interlocutory judgment entered on a decision sustaining a demurrer to the complaint.

*Rich & Aiken*, for plaintiff, respondent.

*James R. Cox*, for defendant, appellant.

LEWIS, J.—The demurrer was sustained, as appears from the opinion of the trial court printed in the case, upon two grounds; 1. That the complaint fails to show a cause of action; 2. That there is a defect of parties, in that the personal representatives are not made parties defendant.

In construing a pleading demurred to, all reasonable intendments will be indulged in for its support. (*LeGrillard v. Clyde*, 86 N. Y., 385.) Guided by this rule in construing this complaint, we are of the opinion that it states a cause of action—not, perhaps, the one that the pleader had in mind when he prepared the complaint. It states that one, Lucius H. Colby, in his lifetime, was the owner and in possession of a house and lot in the city of Auburn, N. Y., and that in the month of May, 1893, he made a proposition of marriage to the plaintiff, which she accepted, and that thereupon an agreement in writing was made and subscribed by the parties, bearing date on the 20th day of May, 1893, by the terms of which it was mutually agreed that the two should be presently married, and that the plaintiff should live with the defendant at his residence, and be a faithful and loving wife to him so long as he should live; and if the plaintiff should survive him she should have the said premises as her own in fee simple absolute; and that in pursuance of the terms of said contract, and in part performance of said agreement, the said Colby executed and published his will and testament in due form of law, by which he duly devised to the plaintiff, her heirs and assigns, forever, the whole of the

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said premises, and he agreed that he would not revoke or alter the will; that on said 20th day of May the parties were duly married, and the plaintiff went at once to live with said Colby at his residence aforesaid, and from that time continued to live with him as his wife, doing all things necessary for his health and comfort, until he died, on the 10th day of March, 1894; that the defendants are the children, grandchildren, and heirs at law of the deceased; that by the undue influence and persuasion of some of the defendants, the said Colby, in the month of September, 1893, disregarding the obligations of his said ante-nuptial contract with the plaintiff, executed and published another and a different will, and undertook thereby to revoke the said will of May 20, 1893, with a view of defrauding the plaintiff. The complaint further alleged that the plaintiff is in the quiet possession of the premises, claiming to be the owner thereof in fee under the said contract and the will made as aforesaid in May, 1893; and judgment is demanded for the enforcement of the said ante-nuptial contract, and confirmation of her title to said premises, and for such other or different relief as to the court shall seem meet and proper. The complaint, in addition to the foregoing, demands judgment for the establishment and probate of the will of May 20, 1893, according to the statute in such case made and provided, and further that the will of September, 1893, be declared fraudulent and void. The latter relief was asked for under chapter 316 of the Laws of 1879, providing for the establishment and probate of wills in the supreme court. The act of 1879 was repealed by §§ 1866 and 1867 of the Code of Civil Procedure. (*Horton v. Cantwell*, 108 N. Y., 255; 13 *St. Rep.*, 615; *Anderson v. Anderson*, 112 N. Y., 104; 20 *St. Rep.*, 344.) The pleader did not seem to have been aware of the repeal of this act when he prepared his complaint. But asking for this relief to which the plaintiff was not entitled did not

prevent her from obtaining other relief to which she was entitled under the allegations of her complaint. There was a legal, binding contract alleged in the complaint, made upon a good and sufficient consideration, which the plaintiff fully and faithfully performed upon her part. The deceased failed to perform on his part. He failed to vest her with the title to the property in question, and in consequence of such failure on the part of the deceased the title to the house and lot descended to the defendants, who are his heirs at law. The relief to which the plaintiff is entitled is a conveyance from these heirs of the title to the premises in fulfilment of the contract of their ancestor. While an agreement to make a certain disposition of property by a last will is one which, strictly speaking, is not capable of a specific execution, yet it has been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement by requiring those upon whom the legal title has descended to convey the property in accordance with its terms. (3 *Pars. Cont.*, 405.) And the court will not allow this post-mortem remedy to be defeated by any device inconsistent with the agreement. The making of the first will was not a complete performance of the contract on the part of the deceased. The contract provided that if the plaintiff performed the contract upon her part she should have the fee of the premises in question. In this respect the deceased failed to perform the contract. The relief to which the plaintiff is entitled is a conveyance of the premises from the heirs-at-law of the deceased.

There is no claim for damages against the estate. The personal representatives of the deceased are not, therefore, necessary parties, and then it does not appear from anything alleged in the complaint that the deceased has any personal representatives. He left a will, but it does not appear that there was any executor appointed by

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surrogate to the board, during their sessions for the years 1888 and 1889. It was also found that, pursuant to statute giving the special surrogate the same power as county judge out of court, the relator granted orders in a large number of proceedings and matters before him. As matter of law, the court decided that the relator was entitled to have allowed him a just compensation for his services as acting surrogate on the occasion when the surrogate was disqualified from acting, but was not entitled to have audited or allowed his claim for services on the occasions when the surrogate was absent from the county. A final order or judgment was entered on this decision, and the appeal is from so much thereof as adjudges that the relator is not entitled to be allowed his claim for services during the absences of the surrogate.

*Herbert C. Sholes*, plaintiff and appellant in person.

*Harry S. Patten*, for defendant and respondent.

MERWIN, J.—The relator was elected under the provisions of chapter 306 of the laws of 1849, which was passed in pursuance of the authority given by section 16 of article 6 of the constitution. By section 1 of the act of 1849, provision was made for the election of a special surrogate in the County of Oneida and seven other countries, and power was conferred on such officers to discharge the duties of surrogate in their respective countries “in cases of vacancy or inability” of such officer. By section 2, as amended by chapter 108 of the laws of 1851, they were given the powers of a county judge out of court. By section 3, it was provided that: “Such local officers shall receive for the services to be rendered by them under the provisions of this act, such compensation as shall be allowed to them, respectively, by the boards of supervisors in the said respective countries.”

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It is quite clear that under this act the relator had power to perform the duties of surrogate in the absence of that officer from the county.\* An inability then existed, that the statute intended to provide for. If, by virtue of that act, the services in question were rendered, then the compensation provided for such services has been fixed and paid. The relator, however, claims that his services were performed by virtue of the provisions of section 2484 of the Code, and that he is entitled therefore, for the time that he acted, to a compensation equal *pro rata*, to the salary of the surrogate, under the provisions of section 2493†. To this it is replied that section 2484 applies by its terms only to cases where "special provision is not made by law for the discharge of the duties" of the office, and that, therefore, it does not apply here, as there was a special provision for the special surrogate to act in the contingency that happened. Substantially the same question was considered by this court in *re* Tyler (60 Hun., 566, 15 N. Y. Supp., 366). The court were then of the opinion that sections 2484 and 2493 did not apply, and that the officer was entitled only to such compensation as was allowed by the board of supervisors in the salary which they fixed. No good reason is apparent for now taking a different view. Following the view taken in the Tyler case, the order or judgment, so far as appealed from, must be affirmed.

HARDIN, P.J., and MARTIN, J., concur.

Order or judgment, so far as appealed from, affirmed, with costs.

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\* See in *re* Frye's estate (20 N. Y. Supp. 588).

† See laws of 1871, ch. 859, sec. 8.

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Laney v. The Rochester Railway Co.

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LANEY APPELLANT v. THE ROCHESTER  
RAILWAY COMPANY, RESPONDENT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,  
NOVEMBER, 1894.

§ 775.

*Appeal—stay of proceedings—stipulation.*

An order to stay proceedings upon a judgment appealed from, may be made by a judge out of court, and such stay may be operative during pendency of appeal.

Where it was stipulated the temporary injunction should be vacated, the issues referred to a referee, that if the issues be finally determined in favor of the plaintiff, the defendant should within thirty days from such final determination institute condemnation proceedings,—*Held*, that this does not preclude an appeal being taken.

(*Decided November, 1894.*)

Appeal from an order denying a motion to vacate an order at chambers staying proceedings.

The facts appear in the opinion.

*Quincy Van Voorhis*, for plaintiff, appellant.

*Charles J. Bissell*, for defendant, respondent.

BRADLEY, J.—The main purpose of the action is to restrain the defendant from constructing a railroad in Elm Street, in front of plaintiff's premises, in the City of Rochester. In the outset of the action a temporary injunction was obtained. This was pursuant to stipulation of the parties, afterwards vacated; and the issues were tried before a referee, who directed judgment for the plaintiff,

which was affirmed by the general term. Thereupon the defendant appealed to the court of appeals, and, upon the application of the defendant, an order was made by a justice of this court staying proceedings on the part of the plaintiff to enforce the injunction awarded by the judgment. The motion to vacate that order was denied by the order appealed from. The plaintiff's counsel insists (1) that it was not within the power of a justice at chambers to make *ex parte* the order staying proceedings; (2) that the defendant is precluded by the stipulation of the parties from taking an appeal to the court of appeals.

An order to stay proceedings upon a judgment appealed from may be made by a judge out of court, and such stay may be operative during the pendency of the appeal (Code Civ. Proc. § 775; *Hull v. Hart*, 27 Hun, 21). The judgment being in this court, no reason appears why the order may not have been granted by the judge who made it, although an appeal had been taken to the court of appeals (*Judson v. Gray*, 17 How. Pr. 289).

The other proposition is founded upon the stipulation of the parties, made before the trial, by which it was stipulated that the temporary injunction should be vacated; that the issues be referred to a referee named; that, if the issues be finally determined in favor of the plaintiff, the defendant should, within thirty days from such final determination, institute condemnation proceedings; and that the defendant should give bond conditioned that it would so institute such proceedings, and pay the amount of damages awarded in them. The reference was perfected, the bond given, and the trial had, as before mentioned. The view urged on the part of the plaintiff is that the issues were finally determined, within the meaning of the stipulation, when judgment was entered upon the report of the referee, and therefore the defendant was required to acquiesce in that judgment, and proceed to exercise the

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right of eminent domain. If that had been the mutual understanding or purpose of the parties, it could have been so expressed as to limit the determination to that which the referee should direct. It is a final judgment, as distinguished from an interlocutory one; and, until the appeal was taken, it was a final determination, and, if affirmed, it will remain such. But, when appeal is taken from a judgment, the issues are not deemed finally determined until a result of the review is reached. The controversy of the parties arising upon the issues continues on the review, and the determination of it finally by adjudication is that of the issues. It would seem to follow that the use of the word "issues" does not give to the stipulation the restricted meaning sought to be applied to it, and that the substantial import of it would have been no different if the word "action" in place of "issues" had been used. The intent of the parties in making the stipulation must be treated as that which its terms import. The order staying proceedings may be so dealt with by the court that it shall not become oppressive to the plaintiff, or prejudicial to his rights. If the defendant failed to proceed with reasonable diligence to permit the appeal to be heard and determined, the plaintiff may by order be relieved from it; and the court will, if occasion requires, direct that the defendant give such further security as may be deemed necessary for the protection of the plaintiff in his remedy for relief. These questions do not arise on this appeal.

The order should be affirmed.

All concur.



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Matter of William C. Camp.

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IN THE MATTER OF THE APPLICATION OF WILLIAM  
C. CAMP, FOR AN ACCOUNTING BY CALVIN  
B. CAMP, HIS GUARDIAN.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,  
OCTOBER, 1894.

§§ 755, 757.

*Surrogates' courts—revival of action.*

Prior to 1891 there was no authority for continuing a pending undetermined special proceedings in the name of administrator or executor.

The right to revive such proceedings in the name of or against executors or administrators of deceased parties depends upon statutory authority.

Sections 755 and 757 do not relate to proceedings in surrogates' courts. (*Decided October, 1894.*)

Appeal from order reviving the proceedings against the executor of Calvin B. Camp.

*Jennings & Russell*, for petitioner.

*Wm. C. Beacher*, for executor.

BROWN, P.J.,—During the pendency of the above-entitled proceeding, and after his accounts had been filed, the guardian died. The proceeding was revived against the guardian's executor, and the order of the surrogate is sought to be sustained, under Sections 755 and 757 of the Code of Civil Procedure. Prior to 1891 there was no authority for continuing a pending undetermined special

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**Matter of William C. Camp.**

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proceeding in the name of an administrator or executor *In re Palmer* (115 N. Y. 493; 26 St. Rep, 338). The right to revive and continue such proceedings in the name of or against executors or administrators of deceased parties depends entirely upon statutory authority. The sections of the Code referred to do not relate to proceedings in surrogate's court. Their application is limited by subdivisions 4 and 6 of section 3347 of the Code, which provide that chapter 8, which includes sections 755 and 757, applies with certain exceptions, not material on this appeal, to actions and special proceedings commenced in the supreme court, a superior city court, the marine court of the city of New York, or a county court. The fact that the sections relied upon to support the order were amended in 1891 does not make them applicable to all special proceedings. In their amended form they are still subject to the limitation of section 3347.

The order of the surrogate is not, therefore, supported by any statutory authority, and must be reversed, with costs.

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Schram v. Werner.

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JOSEPH B. SCHRAM, PLAINTIFF, v. HENRY  
WERNER AND OTHERS, DEFENDANTS.

SUPREME COURT, FIRST DEPARTMENT, NOV., 1894.

§§ 999, 1000.

*Verdict directed—errors of the court—only questions of law raised  
—when motion for new trial has been denied, order directing  
exception to be heard at General Term is void.*

When at the close of the evidence taken upon the trial of an action, the defendants moved that a verdict be directed in their favor, and the motion was denied, but no exception was taken, and the plaintiff moved that a verdict be directed in his favor, which was granted, and the defendants excepted, and neither party asked to have any issue submitted to the jury, only questions of law can be raised on a motion for a new trial on the minutes, on a case and exceptions, or on an appeal.

When a motion for a new trial on exceptions has been made and denied, pursuant to section 999 of the Code of Civil Procedure, the proper remedy is by an appeal from the order entered thereon, which must be heard upon a case, prepared and settled in the usual manner; and an order subsequently made, directing the exceptions to be heard in the first instance at General Term, under section 1000 of the Code is void, and the motion will not be entertained.

*Boes v. Harden* (10 J. & S. 427) and *Garner v. Mangam* (14 id. 365) distinguished.

(Decided November, 1894.)

Motion by the defendants for a new trial on a case with exceptions, ordered to be heard at the General Term in the first instance, after trial and a verdict by the jury rendered by direction of the Court at the New York Circuit Court, Dec. 11, 1893.

In this action plaintiff sought to recover money paid by him on certain bills of exchange or drafts under defendant's written guaranty.

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Schram v. Werner.

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*Albertus Perry*, for plaintiff.

*Nathaniel Myers*, for defendant, Henry Werner.

*Joseph Fettretch*, for defendant, Simon Strauss.

FOLLETT, J.—All of the defendants answered except Samuel Schram, who made default, but Isador Efron did not appear on the trial, and the questions presented by the record arise between the plaintiff and the defendants, Werner and Strauss, doing business under the firm name of Henry Werner. Their answers are identical. At the close of the evidence they moved that a verdict be directed in their favor, which was denied, but no exception was taken, and the plaintiff moved that a verdict be directed in his favor, which was granted, and the defendants excepted. Neither party asked to have any issue submitted to the jury. Upon such a record only questions of law can be raised on a motion for a new trial on the minutes, on a case and exceptions or on an appeal. (*Provost v. McEncroe*, 102 N. Y. 650; *Kirtz v. Peck*, 113 *id.* 222.)

After the verdict was directed the defendants moved on the minutes that it be set aside and a new trial granted: (1) On the exceptions; (2) because the verdict was contrary to the evidence; (3) because the verdict was contrary to law, which was denied and an order entered, which, in addition, directed that the defendants' exceptions be heard in the first instance at General Term, and that judgment in the meantime be suspended. How the exceptions can be heard in the first instance at General Term, under section 1000 of the Code of Civil Procedure, when they have been heard pursuant to section 999, is not apparent to the court. In case a motion for a new trial is made and

denied under section 999, and an order is entered which the defeated party desires to review, it can be done only by an appeal from it, but in this case no appeal has been taken. In case a motion for a new trial is made on the minutes, on exceptions taken, which is denied and an order entered, an order directing that the exceptions be heard in the first instance at General Term is not authorized by the Code, and the motion will not be entertained by this court. (*Byrnes v. D. & H. C. Co.*, 7 *Weekly Dig.* 549.)

In the case cited a verdict was rendered in favor of the plaintiff and the defendant moved for a new trial on the minutes, which was denied and an order entered. An order was then made directing that the defendant's exceptions be heard at the General Term in the first instance. The defendant appealed from the order denying the motion for a new trial, which appeal and the motion on the exceptions were heard on the same record. The General Term of the third department held that the order directing the exceptions to be heard at General Term in the first instance was a nullity, but reviewed the case on the appeal from the order. *Ross v. Harden* (10 *J. & S.* 427) and *Garner v. Mangam* (14 *id.* 365) are sometimes cited as authorities for the position that exceptions may be ordered to be heard in the first instance at General Term after a motion for a new trial has been made on the minutes and denied.\* In the first of the cases last

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\* It is not irregularity for the trial judge at the same time that he denies defendant's motion for a new trial on the minutes, to order the exceptions to be heard in the first instance at General Term, there being but one motion, viz., for a new trial.

*It seems* that a motion that the exceptions be heard in the first instance at General Term may be made after the denial of a prior motion for a new trial on the minutes upon exceptions. *Garner v. Mangam*, 46 *Superior Ct.* 365.

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Schram v. Werner.

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cited a verdict was rendered and a motion was made on the minutes for a new trial on the ground that the verdict was contrary to the evidence, was excessive and contrary to the charge, which was denied and an exception taken, but no order seems to have been entered upon the denial of the motion. Thereupon the exceptions were ordered to be heard at General Term in the first instance, and they were so heard and determined. It will be observed that the motion on the minutes was not founded on exceptions.\* In the second case cited, a verdict was rendered for the plaintiff, and the defendants moved on the minutes to set it aside and for a new trial, which was denied, and an order entered. Thereupon an order was entered directing the exceptions to be heard in the first instance at General Term. A motion was made at Special Term to set aside this order, which was denied, and was affirmed on appeal by the General Term of the Superior Court. The report of the case does not show whether the motion for a new trial was founded on exceptions—errors of the court—as well as on the errors of the jury. On the motion made in the case at bar there were no errors of the jury to review, because it had committed none. The jury had simply returned a verdict in obedience to the direction of the court, and the motion for a new trial could have been made only upon the errors of the court raised by exceptions. When a motion for a new trial on exceptions has been made on the minutes and denied, an order directing the exceptions to be heard in the first instance at Gen-

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\* In *Ross v. Harden*, 42 *Superior Ct.* 427, Freedman, J., says: "The exception to the decision of the motion for a new trial upon the minutes of the court is also unavailable to the defendants. The only mode for reviewing such decision is by an appeal from the order denying the motion."

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Schram v. Werner.

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eral Term is void, and the motion should not be heard. We must decline to decide the motion on this record, but as the plaintiff has not moved to set aside the order, no costs are granted to either party.

VAN BRUNT, P. J., and PARKER, J., concurred.

Motion dismissed, without costs to either party.

**NOTE ON APPEAL FROM DENIAL OF MOTION FOR A NEW TRIAL ON EXCEPTIONS, AND ORDER SENDING EXCEPTIONS TO GENERAL TERM.**

**The Motion.**—A motion at the Circuit for a new trial, when it may be entertained after a verdict rendered, is summary in its character, and the decision of the court thereon is not to be regarded with the same consideration as a decision made upon a formal motion and after a deliberate argument. (*First Nat. Bk. v. Clark*, 42 *Hun*, 90.)

**Exceptions not Necessary.**—Where errors have been committed on the trial, either by admission of improper testimony, or in the charge of the judge, which manifestly tended to prejudice defendant, a new trial will be granted, notwithstanding no exceptions were taken. (*Wehle v. Haviland*, 42 *How. P. R.*, 390.)

**Exceptions Ordered to be heard at General Term—When not Allowed.**—Where a motion for a new trial has been denied, an order made at the same time that the exceptions be heard in the first instance at General Term, is a nullity. (*Byrnes v. D. & H. C. Co.*, 7 *Weekly Dig.* 549.)

**Order Discretionary.**—An order sending exceptions to be heard in the first instance at General Term, ought not to be made, unless in cases of the highest importance or of absolute necessity. (*Beattie v. Niagara Savings Bk.*, 41 *How. P. R.* 187.)

It is exclusively in the discretion of the Circuit Judge whether exceptions shall be heard in the first instance at General or Special Term. (*Id.*)

**What brought up at General Term.**—The right to move in the first instance at General Term is confined exclusively to a class of cases dependent solely on the law, and only the exceptions can be there heard. The exceptions cannot bring up the point for consideration, whether or not the verdict has been rendered either without or against the evidence. (*Price v. Keys*, 1 *Hun*, 177.)

No question of fact can be discussed. (*Hotchkiss v. Hodge*, 38 *Barb.* 117; *Martin v. Platt*, 21 *St. Rep.* 330; *S. C. 4 N. Y. Supp.* 359.)

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Blake v. Bolte.

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ISRAEL O. BLAKE, RESPONDENT, v. HERMANN  
BOLTE, APPELLANT.

NEW YORK COMMON PLEAS, GENERAL TERM,  
DECEMBER, 1894.

§ 2281.

*Salary of public officer—when accessible to creditors—contempt—  
when party can be punished for—*

After the payment of his salary to a public officer, it becomes accessible by legal process for the payment of creditors.

A precept of commitment can not issue pursuant to section 2281 of the Code of Civil Procedure, unless the accused has been adjudged guilty of contempt, and unless such contempt is proved to have prejudiced the right or remedies of a party to the action. (Decided December, 1894.)

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APPEAL from order of General Term, City Court, affirming Special Term order.

The facts are stated in the opinion.

*James P. Niemann*, for defendant and appellant.

*Philip Carpenter*, for plaintiff and respondent.

PRYOR, J.—On the 31st of March, 1894, in a supplementary proceeding in the City Court, an order was served upon the appellant, citing him to attend and make discovery concerning his property, and enjoining him from making meanwhile any transfer or disposition of his property.

The appellant is a justice of a District Court in this city, and as such is entitled to a salary of \$6,000 a year,



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payable in equal installments on the last day of each month. Upon his examination it was disclosed that on the thirty-first of March, or on the second of April, he received \$500, the installment of salary for the month of March; and that he had disposed of forty dollars or fifty dollars. Thereupon an order issued, requiring him to show cause why he should not be punished for his misconduct in so disposing of the property in violation of the injunction, and why a receiver should not be appointed of his property and effects, and why respondent should not have other and further relief. Upon cause shown an order was entered, directing appellant "to pay to the sheriff the amount of the judgment against him; and in default thereof that a precept of commitment issue."

From an affirmance of the order by the General Term of the court below an appeal is prosecuted in this court.

So much of the order as awards a precept of commitment is clearly invalid. The order contains no adjudication that the appellant was in contempt; nor even recites the fact of his contempt; nor adjudges injury to respondent's right or remedy.\* Code, § 2281; *Fischer v. Raab*, 81 N. Y. 235; *Wolf v. Buttner*, 6 Misc. Rep. 119.

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\* The order should recite the substance of the misconduct, the adjudication of guilt, that the misconduct was calculated to and did impair, defeat, and prejudice the rights or the remedies of the prosecutor, or the parties in the cause, and direct the payment of a fine, stating its several items, if any, sufficient to indemnify the party injured, and to satisfy the costs and expenses of the proceeding. When anything remains to be done to purge the contempt, the order should specify what he is to do, and the manner. The costs should be taxed, and inserted in the order, as a part of the fine imposed. *Albany City Bk. v. Schermerhorn*, 9 Paige, 372, rev'g *Clarke*, 297; but rev'g on another point, 10 Paige, 268. Form of order, *People, ex rel. v. Rogers*, 2 *id.* 103.

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Indeed, it is apparent on the papers that the respondent was not damnified by the disposition of appellant's property. The judgment was for \$73.90; and of the \$500 received, the appellant had disposed of but \$50. *Moffat v. Herman*, 116 *N. Y.* 131.

The question remains, whether the direction in the order that the appellant pay to the sheriff the amount of the judgment, with interest, costs and fees, be a correct adjudication.

Appellant's contention is that the money, although actually received and appropriated by him, is still inaccessible to the claims of creditors because his salary as a public officer.

It is readily conceded that were the money still in the city treasury it would not be amenable to process in behalf of appellant's creditors. *Remmey v. Gedney*, 57 *How.* 217; *Columbian Institute v. Cregan*, 11 *Civ. Pro. Rep.* 87. But no court has held, and it would be a reproach to the administration of justice should a court ever hold, that, after payment of a salary to a public officer, it is still inviolable by legal process for the satisfaction of creditors. The extent to which, as yet, the decisions have gone is, that the disbursing agents of government are not to be harassed by efforts of creditors to reach unpaid salary (cases *supra*), and that a salary unearned and not yet payable is neither assignable nor accessible by creditors. *Bowery Bank v. Wilson*, 122 *N. Y.* 478; *Bliss v. Lawrence*, 58 *id.* 442; *Billings v. O'Brien*, 14 *Abb. N. S.* 238 (*N. Y. Com. Pleas*); *Schwenk v. Wyckoff*, 46 *N. J. Eq.* 560; *Beal v. McVicker*, 8 *Mo. App.* 202; *Bangs v. Dunn*, 66 *Cal.* 72. On the other hand, pension money, though in some sort a sacred fund and shielded by a strict statutory exemption, is open to creditors when in the possession of the pensioner. *Cranz v. White*, 41 *Am. Rep.* 408, *note*, 411.

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Counsel for appellant argues that the principle of policy which forbids assignment of the future salary of a public officer is equally applicable to protect salary in his pocket against the claims of creditors. But the ground on which the decisions go is, that if the officer, by assignment, has deprived himself of the hope of future salary, he has lost the incentive to a diligent discharge of his duties—a consideration inoperative with appellant in the enjoyment of his salary.

Appellant's objection that the order is invalid, because the witnesses in the proceeding were sworn by a commissioner of deeds, is frivolous. The Code (§842) expressly designates that officer as competent to take the affidavit, and no other provision requires the oath to be authenticated by the judge or the referee. § 2445.

So much of the order as authorizes commitment reversed ; so much of the order as directs payment to sheriff affirmed ; no costs to either party.

DALY, Ch. J., concurs.

So much of order as authorizes commitment reversed ; so much of order as directs payment to sheriff affirmed ; no costs to either party.

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Kreiser v. Scofield.

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KREISER v. SCOFIELD *et. al.*

NEW YORK COURT OF COMMON PLEAS, GENERAL

TERM, DECEMBER, 1894.

§§ 572, 863, 864.

*Execution against person after 10 days, not set aside—false imprisonment—action at common law—privileged person—against whom action lies.*

Immunity from execution against the person after judgment can not be claimed by a defendant under section 572 Code of Civil Procedure, providing for discharge from custody where the plaintiff neglects to issue a body execution within ten days after the return of the execution against the property. Such statutory provision applies only to an order of arrest.

The action for false imprisonment for arrest of a privileged person is a statutory proceeding, and will not lie at common law.

Such an action, under the Code, sections 863 and 864, is maintainable only against the officer or person actually making the arrest, and even they are not liable unless the person arrested claims his exemption.

A witness's immunity from arrest prevails only while going to, remaining at, and returning from court, and is lost if he unreasonably delays his return.

(Decided December, 1894.)

Appeal by defendants from a judgment of the New York City Court, General Term, affirming a judgment in favor of plaintiff.

*William G. McCrea*, for defendants, and appellants.

*Abram King*, for plaintiff, and respondent.

PRYOR, J.—The action is trespass for false imprisonment. The detention of the plaintiff was by execution against the person after judgment, and without an

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order of arrest. Upon motion in the Court, in which the action was depending, the execution was vacated and set aside, and the defendant discharged. The order of vacatur does not state that the process was void, but recites that it was superseded because not issued within ten days after the return of execution against property, nor within three months after entry of judgment, and because the defendant was arrested while returning from attendance in court as a witness. The order of vacatur, we assume, is *res judicata* between these parties in the present action; but only then as to matters relevant and material, to the motion, and not as to the facts irrelevant and material (*People v. Johnson*, 38 N. Y. 63). Upon the motion to set aside the process, the fact that it was not issued within ten days after return of the property execution, nor within three months after judgment, was wholly immaterial, and imparted to the court no power to supersede it. (*Redner v. Jewett*, 25 N. Y. Supp. 273; *Sweet v. Norris*, 12 Civ. Proc. R., 175, 176; *Id.* 110 N. Y. 668.)\* The unanimous decision of the Court of Appeals is conclusive upon the point. Here then is no adjudication that the execution against the plaintiff's person was void for irregularity. The process being valid the inference is unavoidable that it was set aside only because of irregularity in its service. But at common law an arrest of a privileged person is voidable only, not void,—does not constitute a trespass,—and so is unavailable and insufficient as foundation of an action for false imprisonment. (*Deyo v. Van*

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\* The section applies only to cases in which an order of arrest is issued, pending the action, and has no reference except as stated in the last clause, to cases of execution against the person. *Redner v. Jewett*, 25 N. Y. Supp. 273; S. C. 54 St. Rep. 774; S. C. 72 Hun, 508.

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Valkenburgh, 5 *Hill*, 242 ; *Smith v. Jones*, 76 *Me.* 138 ; 7 *Am. and Eng. Enc. Law*, 694, notes ; 3 *Lawson, Rights, Rem. and Pr.* 1067, and note ; *Cooley, Const. Lim.* (5th Ed.) 162, note) ; Code, sections 863, 864, denounces an arrest of a privileged witness as void, and authorizes a action for the wrong. But it is manifest, on the pleadings and the proceedings at the trial that the suit was instituted and conducted as a common law action. No reference was made to the statute, nor pretense of a claim of privilege by the plaintiff, nor right asserted to treble damages. Incontestably the ground of action on which the plaintiff reposed was the irregularity of the execution, because issued too tardily. But, whether proceeding on the ground of irregularity in the execution, or in the arrest in violation of plaintiff's privilege, in either aspect can the suit be maintained as a common law action, because the execution itself was regular and valid (citations *supra*), and because arrest of a privileged person will not sustain an action for false imprisonment (citations *supra*).

Supposing, however, that the action proceeds upon the statute, still it is impossible to uphold it.

The statute (Code § 863) authorizes an action only "against the officer or person making the arrest." And even they are not liable unless the person arrested claims his exemption, section 864. True, he is not bound to make the affidavit until required by the officer, but clearly he must claim his privilege, for, until such claim be known to the officer his requirement of the affidavit would be preposterous. No proof, we may add, was made by the plaintiff that he apprised the officer of his exemption, but an offer by the defendants of evidence to the contrary was rejected.

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It is the obvious and inevitable construction of the statute (§§ 863 and 864) that the action is authorized only against the person *making the arrest*. Had the liability imposed been intended to comprehend the plaintiff and his attorney the law would have been so declared in terms, instead of suffering such a severe penalty to lurk in the ambush of an equivocal implication.

If it be argued that he who directs, aids or abets a trespass is himself a trespasser, we answer that there is neither allegation nor proof that either of the defendants suggested or contemplated the arrest of the plaintiff while protected by his privilege. The uncontradicted evidence is all to the contrary. The attorney, defendant McCrea, testified that he instructed the deputy that the plaintiff "was not to be arrested until he got home," and that "he intended he should be arrested in his place of business after he had returned from being examined." Nay, more; the attorney endeavored to countermand the execution, but the plaintiff's own attorney insisted on his arrest. The arrest was made in the office of the plaintiff's attorney, and the certain and incontrovertible inference from the evidence is that it was made at the attorney's instance.

The process having been delivered to the sheriff without direction for its illegal execution; nay, with positive instruction not so to execute it, neither the defendant Scofield nor the other defendant, his attorney, is responsible for the arrest. (*Welsh v. Cochran*, 63 N. Y. 181.)

Supposing, again, defendants answerable for plaintiff's arrest, still the action is without support for lack of proof that the plaintiff was arrested while privileged as a witness. The immunity from arrest

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prevails only while the witness is going to court, or in court, or returning from court. The undisputed evidence is that the arrest was made after the examination of the plaintiff and his departure from the court house, and while he stopped in his attorney's office upon a business not at all connected with his service or duties as a witness. His privilege was then expired. (*Marks v. Societe, etc.*, 19 *N. Y. Supp.* 470, affirmed in the Court of Appeals on the opinion below; *Finch v. Galligher*, 12 *id.* 487.) In these cases the witness was from abroad, and even less indulgence is allowed to a resident of the city. It is not to be imagined that the plaintiff, as a witness, was embarrassed or molested by his arrest.

The learned trial judge committed error in denying the motion to dismiss the complaint.

Judgment reversed and new trial ordered, costs to abide event.

DALY, Ch. J., and BISCHOFF, J., concur.

Judgment reversed and new trial ordered, costs to abide event.



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Munzinger v. The Courier Co.

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LOUIS MUNZINGER, APPELLANT, v. THE COURIER COMPANY, RESPONDENT.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,  
DECEMBER, 1894.

§§ 723, 1919.

*Unincorporated association sued as corporation—amendments of summons and complaint.*

Under section 723 of the Code of Civil Procedure, the Court has power to change the name of the defendant in an action, where such defendant has been improperly named, provided that the defendant so substituted be the same and not a new individual.

Where an unincorporated association has been sued as a domestic corporation, under the mistaken assumption that it is such, the Court has power to amend the summons and complaint to the extent of substituting the name of the president of the association as defendant, in order to comply with the provisions of section 1919, Code of Civil Procedure, and to amend the summons by changing its allegations to the same effect.

N. Y. State Monitor Milk Pan Association v. Remington Agricultural Works, 89 N. Y. 22, and Bassett v. Fish, 75 N. Y. 308, distinguished.

(Decided December, 1894.)

Appeal from order of the Special Term, denying plaintiff's motion to amend summons and complaint.

The facts are stated in the opinion.

*Benjamin Patterson* (of counsel), for plaintiff, and appellant.

*Ansley Wilcox* (of counsel), for defendant, and respondent.

O'BRIEN, J.—The plaintiff brought an action for libel against the Courier Company, alleging upon information and belief that it was a domestic corporation and the proprietor and publisher of a newspaper

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called the Buffalo *Courier*. The amended answer, while admitting that the Courier Company was such proprietor and publisher, denied that it is or ever was a domestic corporation, and this answer is verified by George Bleistein, who deposes that he is president of the Courier Company. Upon service of this answer plaintiff, upon an affidavit showing that he had inadvertently sued the defendant as a domestic corporation, when in fact it is an unincorporated association, doing business under the name of the Courier Company, and that there is no corporation by the name of the Courier Company, moved for leave to amend the summons and complaint by making the title of the defendant "George Bleistein, as President of the Courier Company," and by changing the allegation that the defendant was a corporation to one that it was an unincorporated association.

There is no question made, but that if the defendant is an unincorporated association the Code provides that it may be sued in the name of its president, or all its individual members may be sued if known to the plaintiff (*Code Civ. Pro.* § 1919). The real question is as to whether the Court had power to allow the amendment in the title. The Judge at Special Term denied the motion for leave to amend upon the authority of the case of *N. Y. State Monitor Milk Pan Association v. Remington Agricultural Works* (89 *N. Y.* 22), wherein it was held that the Code (§ 723) does not authorize the striking out of the name of the sole defendant in an action and the insertion in lieu thereof of the names of other persons as defendants; and the reasons given are that the effect of striking out the name of the defendant and inserting the names of three other persons as defendants in lieu thereof "is to continue the action against other and different

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parties than the one named, thus substituting a cause of action with new and other defendants." In the opinion the case of *Bassett v. Fish* (75 *N. Y.* 303) is cited, wherein it was held that the complaint could not be amended by striking out the names of the defendants, who were sued as school trustees, and inserting the name of the corporate board of education to which they belong.

In both these cases it will be noticed that the persons sought to be brought in were different from those upon whom process had been served ; and these decisions go to the extent of holding (and very properly) that where one person or corporation is sued, another and different person upon whom process has not been served cannot be brought in as a sole defendant by way of substitution. This is clearly pointed out in the dissenting opinion of the General Term in *N. Y. Milk Pan Co. v. Remington Works* (25 *Hun.* 479), which was the one receiving the approval of the Court of Appeals. Among the other cases therein collated and discussed reference is made to *Newton v. Milleville Mfg. Co.* (17 *Abb.*, 318, note), *Tighe v. Pope* (16 *Hun.* 180) and *Bank of Havana v. Magee* (20 *N. Y.* 355). As therein said : "*Newton v. Milleville Mfg. Co.* is a Special Term case, briefly reported, where the plaintiff, in ignorance of the true name of defendants and supposing them to be a corporation, which they were not, had sued them by the name in which they transacted their business. He was allowed, on motion, to substitute their names as defendants under section 175 of the old Code of Civil Procedure. If the plaintiff in the present case had made the Remington Agricultural Company defendant, supposing it to be a corporation, this case would have been like that cited. As it is, the analogy fails, because the plaintiff has

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not sued Philo Remington and his partners, but has sued an existing corporation which is entirely distinct from them. In the case cited there was no corporation, but the name inserted in the summons as that of the defendant was the partnership name of the very persons whose real names were afterwards substituted. No new person was brought in. The real defendants had been sued under their partnership. \* \* \* The case of *Tighe v. Pope* was one where an action was brought against one, describing her as administratrix, and asking judgment against her as such. The motion was to strike out the words 'as administratrix.' The Court held that it should be granted, remarking that, 'whether the amendment were allowed or not, the same person will be defendant.' \* \* \* The case of *Bank of Havana v. Magee* was one where the plaintiff miscalled himself by the name 'Bank of Havana,' instead of using his true name, 'Charles Cook.' An amendment giving his true name brought in no new party. There was no person, natural or artificial, called 'Bank of Havana,' but that name was one used by Cook, the real plaintiff, in his business. Like the case last cited, therefore, the amendment brought in no person who had not in fact been a party previously."

In addition to the above we have a Special Term decision of this Court of *McKane v. Democratic General Committee of Kings County* (21 *Abb. N. C.*, 89), where a voluntary unincorporated association was sued in its own name, but the summons was served on its president; and an amendment to the title of the action was allowed, changing the defendant's name to that of its president in order to comply with the Code of Civil Procedure, section 1919, allowing such an association to sue or be sued in the

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name of its president or treasurer. As therein said: "The plaintiff endeavored to bring into court the voluntary association against which he seeks to enforce some right. He has caused the proper officer of that association to be served with process, and has simply omitted to name that officer in the title of the action as president of the association."

It is true that, in the case last cited, the plaintiff did not, as here, sue the defendant as a corporation; but in that, as in the other cases cited, the distinction between a case where an amendment will and where one will not be allowed, is pointed out, viz., that where there is merely a misnomer or some defect in the designation, and not a substitution or change of the party, the amendment will be allowed.

The question therefore is, whether there is here sought a change of the party defendant.

The plaintiff is suing the proprietor and publisher of the *Buffalo Courier*, which is called the Courier Company and does business under that name. This the defendant admits, denying merely that it is a corporation. The amendment desired is not to substitute an individual, but to change the name so as to conform to the statute. It is the Courier Company, publisher and proprietor of the *Buffalo Courier*, that will still be the defendant, but, as it turns out that instead of being a corporation it is an unincorporated association, the title of the action must be changed. The amendment asked is precisely the same as if a person were sued as administrator of A, and it subsequently appearing that he was not such administrator, but was the administrator of B, an application should then be made to amend so as properly to designate the party defendant.\* That the Court has the power to

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\* The same state of facts exists, and the same decision was ren-

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allow such an amendment under section 723 of the Code, in furtherance of justice, has been many times held, and yet such an amendment is nothing more than the plaintiff here asks—that is, to bring in a party doing business under a name equally suited to either a corporation or an unincorporated association, and which he finds, upon the party appearing in court, has been incorrectly described or misnamed, but which he still wishes to retain in court, after amending the process and pleadings so as properly to designate the defendant. In other words, there is no change of party, the same individual being still before the Court, but having misnamed him, it is proposed to correct such misnomer, which we think the Court, in a proper case, has the right to permit.

The error into which the plaintiff fell was a natural one, and his failure properly to describe the defendant is satisfactorily explained. There being no denial of the merits, and no laches having been shown on the part of the plaintiff in moving, it having been denied by the Court below solely upon the ground of want of power, we think that the order should be reversed, with \$10 costs and disbursements to appellants, and the motion for leave to amend granted upon payment by plaintiff of the costs of the action up to the date of the service by plaintiff of his notice of motion.

FOLLETT, J., concurred.

VAN BRUNT, P. J., dissented.

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dered in *Evoy v. Expressmen's Aid Soc.* 51 *St. Rep.* 38, S. C., 21 *N. Y. Supp.* 641.

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Townsend v. Auld.

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## TOWNSEND v. AULD.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,  
DECEMBER, 1894.

## § 923.

*Promissory note—no notice of dishonor—deposit in private letter box not a deposit in the post-office.*

A notarial certificate of dishonor which does not specify, in conformity with section 923 of the Code of Civil Procedure, the reputed place of business of the defendant and the post-office nearest thereto, is not presumptive evidence of notice of dishonor.

Such certificate is however presumptive evidence of such things as it distinctly states and purports to give evidence of.

The placing of a protest in a private letter-box in a private office, without further evidence of its fate, is not equivalent to a deposit in the post-office.

On the above facts, it is a question for the jury, whether notice of dishonor was ever received by the defendant, and the Court below erred in directing a verdict for the plaintiff.

(Decided December, 1894.)

Appeal by the defendant from a judgment of the General Term of the City Court, affirming a judgment of the Special Term on a verdict directed for plaintiff.

The facts are stated in the opinion.

*Theodore H. Friend*, for defendant, and appellant.

*Charles P. M'Clelland*, for plaintiff, and respondent.

PRYOR, J.—Action on promissory note against indorser. Defense, no notice of dishonor. The note was payable at the Tarrytown National Bank, Tarrytown, N. Y. A notarial certificate of dishonor was introduced in evidence, but, although purporting to be

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in conformity to the provisions of section 923 of the Code of Civil Procedure, it failed to specify "the reputed place of business of the defendant," and "the post office nearest thereto." The defendant served no affidavit that he had not received notice of dishonor, and the point presented for decision is, whether, because of the absence of the specification of residence and post-office, the certificate was nugatory as presumptive evidence of notice of dishonor.

The adjudications cited by the plaintiff in support of the sufficiency of the certificate as presumptive notice of dishonor, critically examined, afford no ground for his contention. *Treadwell v. Hoffman*, 5 *Daly*, 207, 213, proceeds avowedly on the authority of *Ketchum v. Barber*, 4 *Hill*, 225, 237. But *Ketchum v. Barber* proceeds on a palpable misconception of the import of the statute (chapter 141, *Laws*, 835; 4 *Edm. St. at Large*, 455). The effect of the certificate as notice does not appear to have been a question in the case; the sole point considered in the prevailing opinion of Nelson, C. J., or of Bronson, J., concurring, being whether the note was void for usury. Cowen, J., however, adverted to the certificate, and held it valid on the ground that the act of 1833, chapter 271 (identical with section 923 of the Code), had been modified by the act of 1835. But the acts of 1833 and 1835 are in no sense inconsistent.\* They embrace different sub-

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\* In all actions at law, the certificate of a notary under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to whom the same was given, and the post office nearest thereto, shall be presumptive evidence of the facts contained in such certificate, but



jects, and have in view different objects. The act of 1833 constitutes the certificate a notice of dishonor. The act of 1835 does not touch or contemplate any certificate, but only provides that a notice of dishonor shall be sufficient if mailed "to the city or town where the person sought to be charged resided." The latter statute provides for service of the notice; the former, for proof of the service. They are wholly apart and neither derogates from the effect of the other. It was an inadvertent and untenable ruling, therefore, to hold that the act of 1835, in any particular, qualified the operation of the act of 1833. Similarly, when the case was in the Court of Errors (*7 Hill*, 444), no member of the many who discussed it considered the point of the sufficiency of the certificate,—the entire debate involving only the question of usury,—and the judgment was affirmed on the decision of that question alone. See note at end of report. It was unwarrantable then and misleading, to insert in the syllabus, as an adjudication of the Court that "since the act of 1835 the certificate need not specify the reputed place of residence of the party notified, nor the post-office nearest thereto." At all events by incorporating the

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this section shall not apply to any case in which the defendant shall annex to his plea an affidavit denying the fact of having received notice of non-acceptance or of non-payment of such note or bill. *Laws of 1833, ch. 271, § 8.*

In all cases where a notice of non-acceptance of a bill of exchange, or non-payment of a bill of exchange, promissory note or other negotiable instrument may be given by sending the same by mail, it shall be sufficient if such notice be directed to the city or town where the person sought to be charged by such notice resided at the time of drawing, making, or endorsing such bill of exchange, promissory note or other negotiable instrument, unless such person at the time of affixing his signature to such bill, note, or other negotiable instrument, shall in addition thereto, specify thereon the post-office to which he may require the notice to be addressed. *Laws of 1835, ch. 141, § 1.*

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statute of 1833 in the Code subsequently to the statute of 1835, the legislature makes manifest its intention that the provision of the former enactment shall not be superseded by the latter.

Reversal of the judgment, however, may not be the necessary consequence of the imputed defect in the certificate. The certificate states the demand and the non-payment; the protest; and the deposit in the post-office of notice of protest, postage prepaid, addressed to the defendant, "Thos. Auld, New York." Section 923 of the Code provides that :

"The certificate \* \* \* of the presentment \* \* \* for payment or of the protest, for non-acceptance or non-payment of a promissory note \* \* \* or of the service of notice thereto \* \* \* specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given and the post-office nearest thereto, is presumptive evidence of the facts certified."

The facts of presentment, non-payment, protest, service of notice and the mode of giving the notice, are all recited in the certificate, and the certificate is therefore presumptive evidence of "the facts certified." A writer of the highest authority says, that the certificate "is evidence of such things as it distinctly states, and purports to give evidence of." (2 *Daniel, Neg. Inst.* 962).<sup>\*</sup> Assuming that the direction "New York," be a sufficient address, nothing is wanting to the completeness of the notice, except proof of the residence of the defendant in New York, and that proof he himself supplied on the trial. It is objected, however, that the certificate is that the notice of protest was directed to "New York" simply, not New York City.

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<sup>\*</sup> A certificate is only presumptive evidence, and may be rebutted. *Meise v. Newman*, 76 *Hun*, 341.

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The act of 1835 provides that the notice shall be sufficient "if directed to the city or town where the person sought to be charged resided." Is it open to dispute or to doubt that a letter mailed at Tarrytown, in this state, addressed to "Thos. Auld, New York," would be understood by the post-office authorities as intended for the City of New York, and be transmitted and delivered accordingly? Common sense is to be consulted in the construction of statutes and of evidence; and by this the surest and safest of all guides, we are led to the conclusion that the unmistakable destination of a letter directed in this state simply to "New York" is New York City.

Supposing the certificate wholly ineffectual as proof of notice of dishonor, the plaintiff gave other evidence of the fact; and the question is, was it sufficient? A duplicate copy of the notice was sent to the plaintiff, and in due time he essayed to mail it to the defendant. Had this copy been deposited in the post-office to the defendant's proper address, that would suffice as valid service of notice of dishonor. *Gawtry v. Doane*, 51 N. Y. 84, 90; *Manchester v. Van Brunt*, (Com. Pl. N. Y.) 22 N. Y. Supp. 362. But it was not deposited in the post office. It was deposited, said the plaintiff, "in a letter-box—in a receptacle in our office for the receipt of letters to be mailed." It was not traced into the mail, or the hands of a letter-carrier. This is the evidence:

"Q. Do you know what became of this sealed envelope, postpaid, addressed to Mr. Auld, after it was deposited? A. I know no more than what is the custom of the office. Q. Do you know what became of it? A. I never saw it afterwards."

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\*The notarial certificate is presumptive evidence of reputed place of business. *Bell v. Lent*, 24 Wend. 230.

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In *Bank v. Crow*, 5 *Daly*, 191, affirmed 60 *N. Y.* 85, we held that a deposit in a lamp-post box provided by the government is a deposit in the post-office. So, in *Wynen v. Schappert*, (6 *Daly*, 558), we adjudged a delivery to an official letter carrier to be a deposit in the post office. But to rule that the placing a protest in a private receptacle in a private office, without further evidence of its fate, is equivalent to a deposit in the post office, would strain the sense of the statute beyond all reason, and substitute a constructive notice of dishonor, for which the law affords no sanction.

Our conclusion is that the notarial certificate authorizes the inference that the notice of dishonor was duly deposited in the post-office, and was directed to the defendant at the city of his residence. But the proof is presumptive only, and as such was open to rebuttal. Accordingly, the defendant offered to show that he never received the notice, but the evidence was rejected. The ruling was error. The fact that the notice was not received surely tends to the conclusion that the notice was not duly mailed to the defendant at his post-office. Were it the fact that the notice, directed to the proper post-office, had been deposited in the mail, evidence of its non-receipt would be immaterial. *Gawtry v. Doane*, *supra*; *Arnold v. Railroad Co.* 5, *Duer*, 207, 211. But the due posting and direction of the notice rests only upon presumptive proof, and evidence to the contrary was admissible.

The court erred, also, we incline to think, in directing a verdict. Even in the absence of proof to the contrary, it was probably still a question for the jury, on all the facts of the case, whether the notice had been received by the defendant.\* (*Dunn v. Devlin*,

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\* Where it appears by the notarial certificate, that the notice of protest was given by depositing the same in the post-office, directed

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2 *Daly*, 122). However this may be, the error in the exclusion of evidence requires a reversal of the judgment.

Judgment reversed and new trial ordered ; costs to abide event.

DALY, C. J., and BISCHOFF, J., concur.

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CHAMBERS v. CHAMBERS.

SUPREME COURT, NEW YORK SPECIAL TERM,  
JANUARY, 1895.

§ 1753.

*Action to annul marriage—default—facts must still be proved—  
marriage register as proof.*

In an action to annul a marriage, judgment shall not be granted on default without proof of the facts upon which the allegations of nullity are founded (section 1753, Code of Civil Procedure).

A marriage register is not prima facie evidence of the marriage, of which it purports to contain an entry.

In an action to annul a marriage, the proofs should have been competent, clear, and convincing, and since they were not, judgment was refused, and the case sent back to the referee for further proof.

(Decided January, 1895.)

Motion to confirm Referee's report, annulling a marriage.

The facts are stated in the opinion.

*Samuel Tuttle*, for plaintiff.

*Reuben Mapelsden*, for defendant.

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to the indorser at New York City, (his residence). *Held*, that such presumption is not overcome by testimony of the notary on the trial that he might possibly have directed the notice to a particular street in which defendant did not reside ; and therefore it was not error to submit to the jury the question of the sufficiency of the notice.

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BEEKMAN, J.—In an action to annul a marriage on the ground of a previous marriage of the defendant which is still in force, section 1753 of the Code of Civil Procedure prescribes, among other things, that a final judgment annulling the marriage shall not be rendered by default without proof of the facts upon which the allegation of nullity is founded, and, also, that “the declaration or confession of either party to the marriage is not alone sufficient as proof, but other satisfactory evidence of the facts must be produced.”\* The proofs in this case, which were taken before the referee, do not seem to satisfy this requirement. Substantially the only proof of the previous marriage complained of consists of the declarations of the defendant, testified to by the plaintiff. A marriage register of the Reformed Church at Belleville, New Jersey, purporting to contain an entry of the marriage in question, was produced by the minister in charge and the entry read in evidence. The witness who produced the book, however, did not himself solemnize the marriage, was not present when it took place, and could not do more than identify the book and state that the entry was made during the incumbency of one of his predecessors. No reason appears why the clergyman who made it was not produced as a witness, and proof of the fact made through him. Books of this character do not prove themselves nor are they *prima facie* evidence of the statements they contain. The rule here is the same as in England, that the keeping of

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\* Marriage is never annulled on admission only. *Montgomery v. Montgomery*, 8 Barb. Ch. 132.

No judgment, annulling a marriage contract, or granting a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. Rule 77, under section 1757, Code of Civil Procedure.

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the book must be required by law in order to give it credit as *prima facie* proof, and it is on this ground only that the English Courts have admitted parish registers in evidence as proof of their contents. Of course where the event recorded is old, and from the nature of the case better evidence cannot be obtained, it may be in a certain class of cases that the record would be admitted as a circumstance tending with others to satisfy a reasonable mind that the fact to be proved did exist, but that is not at all this case. The alleged previous marriage is stated to have taken place on March 12, 1887, and it should not be difficult to obtain competent proof of the fact. Nor is there satisfactory evidence outside of her own declaration of the identity of the defendant with the woman whose marriage is so recorded. It appears from the proofs that the person claimed to be her husband by the previous marriage is accessible, but he was not produced before the referee and no reason appears for his not being examined. Without attempting further to discuss the evidence of, some which strikes me as improbable, I am not willing to grant the relief asked for on the case as it has been substituted to me. The action is one of the gravest character and the judgment asked for should not be granted unless the proofs are competent, clear and convincing, especially as there is a child by the marriage whose status will be gravely affected by the action of the court. The fact that the defendant has made default in pleading does not relieve the plaintiff from the necessity of making such proof. The case should go back to the referee for further proof.

Let an order be submitted to me accordingly.

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Donald v. Elliott.

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## PETER DONALD v. THOMAS ELLIOTT.

SUPREME COURT, WESTCHESTER COUNTY CIRCUIT.

§§ 1651 *et seq.**Waste—treble damages—tenant not liable for waste by his assignee of the term.*

Where a lease contains a covenant against waste by the tenant, but no provision against subletting or assigning, and the tenant assigns his term, and waste is committed by the sub-lessee, the lessor cannot maintain an action against the tenant under sections 1651 *et seq.* of the Code of Civil Procedure and recover treble damages, but he is put off for his remedy to an action against the assignee for waste, or against the tenant for the breach of the covenants of the lease.

*(Decided January, 1895.)*

Motion by the plaintiff for treble damages under section 1655 of the Code, and motion by defendant to set aside a verdict recovered by plaintiff for single damages. The facts are stated in the opinion.

*John H. Ferguson*, for plaintiff,*William Riley*, for defendant.

GAYNOR, J.—The plaintiff let his farm to the defendant for a term of five years, the lease, in addition to the usual covenant against waste, containing a covenant that no wood should be cut down by the tenant. It contained no provision against sub-letting or assigning. This lease was extended three times, namely, for three years, then for one year, and again for one year. The complaint is in so many words that the defendant, in violation of the covenants contained in the said lease, did negligently suffer waste to be committed upon the said land, in that he suffered certain specified trees to be cut down and carried away,



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three barn doors to be torn off, the barn floor to be torn up and the chicken house to be pulled down, whereby the said land was damaged in the sum specified; and judgment for treble damages is prayed for in accordance with the statute against waste (*Code Civ. Pro.* § 1855). The plaintiff had a verdict, and now moves for judgment for treble the amount thereof, while the defendant moves to set the verdict aside on the ground that, conceding the waste, the defendant is not liable therefor, the proof being that the same was committed not by him but by his assignee of the last four months of the term, after he had delivered exclusive possession to him. If the action must be considered one for waste, as the plaintiff's counsel insists, I think the verdict must be set aside. The action could not be maintained under the common law, for the action for damages for waste did not lie at common law against a tenant for years. Blackstone says (2 *Com.* 283) that \* "in our ancient common law \* \* \* waste was not punishable in any tenant save only in three persons: guardian in chivalry, tenant in dower and tenant by the curtesy, and not in tenant for life or years. And the reason of the diversity was that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life or for years came in by the demise and lease of the

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\* Not so under the Code, *Purton v. Watson*, 19 *St. Rep.* 6.

One seized of an estate in remainder or reversion can maintain an action of waste, notwithstanding any intervening estate for life or years. Such interest need not continue to exist in plaintiff at the time of the commencement of the action. A reversioner or remainderman whether such in fee or for life or years, may, if his residuary interest was wasted, bring either the "real action," of waste, or a suit for trespass for single damage alone. *Purton v. Watson. Supra. Williams v. Peabody*, 8 *Hun*, 271.

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owner of the fee, and therefore he might have provided against the committing of waste by his lessee, and if he did not, it was his own fault."

In the three specified cases, the relation being created by the law, the owner of the fee had no covenant to sue upon, and was therefore remediless except as the law gave him a right of action; whereas in leaseholds the lessor could put covenants in the lease for the breach of which he would have right of action. It has been denied that the common law rule was thus restricted (2 *Reeve's Hist. Eng. L.* 73, 184), but it is uniformly so stated by commentators (*Co. Litt.*, 54; *Bac. Ab.*, tit. *Waste*, H.; *Com. Dig.*; tit. *Waste*; 2 *Black. Com.* 283, 4 *Kent Com.* 79). But the statutes of Marlbridge (52 *Hen.*, 3. c. 23), and of Gloucester (6. *Edw.*, 1. c. 5) extended the action to all tenancies for life and for years; the former enacting that "farmers shall not make waste \* \* \* without special license had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convicted, they shall yield full damage, and shall be punished by amerciamment grievously"; and the latter enacting that "a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life or for term of years, or a woman in dower. And he that shall be attainted of waste shall lose the thing that he has wasted, and, moreover, shall recompense thrice so much as the waste shall be taxed at." The penalty of treble damages, first introduced by this statute of Gloucester, survives with us. All tenants for life and for years, under tenancies created by lease or other act of the owner being thus made liable to the action for waste, the same as tenants by act or operation of law, we need to inquire whether the right of action

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continued against them after assignment of the leasehold, for the waste of the assignee. The rule was that if tenants by the curtesy or in dower "grant over their whole estate, and the grantee doth waste, yet the heir shall have an action of waste against them," but that "in all other cases the action of waste shall be brought against him that did the waste (for it is in the nature of a trespass), unless it be in the case of a ward," etc. (*Co. Litt.* 54). The reason why the right of action in the heir for waste done by the grantee of the tenant in dower or by the curtesy was against such tenant and not against the assignee, was put upon the ground of privity; but if the heir also granted the reversion, such privity was lost, and his grantee had to sue the assignee of the tenant. This subtle and arbitrary distinction, in respect of tenancies in dower and by the curtesy long survived (*Bates v. Schraeder*, 13 *Johns.* 260; 2 *Kent Com.* 131); but it never had any application to tenancies created by the act of the owner of the fee, which is the case in hand. "If tenant for life or for years assign his estate, waste lies against the assignee for waste done after the assignment." (*Com. Dig., tit. Waste, c. 4*; *Bac. Ab., tit. Waste, H.*) Though not there stated, this rule seemed to be recognized in *Cook v. The Champlain Co.* (1 *Denio*, 103).

That the rule was as above stated, in respect of tenancies for years and for life created by act of the owner appears conclusively from the later statute (11 *Hen. 6, chap. 5*) against the abuse of such tenants letting and granting their estates nominally in order to escape liability for waste. That statute, "because that \* \* \* the said tenants have oftentimes let and granted their estates \* \* \* to many persons to the intent that they, in the reversion, that is to say their lessors, their heirs or their assigns, might not

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have knowledge of their names, and after the said first tenants continually occupy the said lands and tenements, and thereof take the profits to their proper use, and in the said lands and tenements commit waste and destruction, to the disinheritation of them in the reversion," provided that they, in the reversion in such case might maintain the writ of waste against such tenants as though such nominal grant and lease by them had not been made. If the action lay against the first tenant in every case, notwithstanding an assignment by him of his term, there was no need for this statute against sham or colorable assignments. This same provision, with the provisions of the two earlier English statutes cited, may be traced through the statutes of this State (*Laws N. Y.*, 1787, *ch.* 6; 1 *R. L.* 62; 2 *R. S.* 334) down to their latest enactment in our code of practice, where one might well be least likely to look for provisions of substantive law (Code Civ. Pro. 1651-9.) These provisions of the Code are the gist of the three English statutes and their lineal successors in this state against waste, and of the rules thereunder, which have been cited above. Section 1651 provides that "an action for waste lies against a tenant by the curtesy, in dower, for life or for years, or the assignee of such tenant, who during his estate or term, commits waste upon the real property held by him without a special and lawful written license so to do; or against such a tenant, who lets or grants his estate, and, still retaining possession thereof, commits waste without a like license." Here we have the provisions of the statutes of Marlbridge, of Gloucester and of 11 Hen. 6, defining those liable for waste, carefully summarized; and in addition the rule that in case the waste be committed by the assignee of the tenant, the action therefor lies against such assignee; and in

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this respect the former distinction in the case of tenants by the curtesy and in dower, above noticed, is abolished. It is contended that the provision for an action against the assignee of the tenant is permissive only, and does not prevent the action from being brought against the tenant, but whatever uncertainty there might be in this respect concerning the interpretation of this section of the Code, is prevented by tracing, as has been done above, the evolution of the law of waste which this Code provision summarizes and makes homogeneous.\*

It follows from the foregoing that the present action cannot be maintained as an action for waste, the waste having been committed, not by the defendant but by his assignee of the remainder of the term. But the action may be upheld as one for damages for breach of the covenants of the lease, namely, the general covenant against waste and the special one that no wood should be cut down. The defendant could not relieve himself of these covenants by transferring the leasehold (*Bac. Ab., tit. Cov. E.*; *Walton v. Conly's Ad.*, 14 *Wend.* 64; *House v. Burr*, 24 *Barb.* 525).

The motion for treble damages and to set aside the verdict are therefore each denied.

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\* The decisions upon this subject as to whether the clause "against a tenant \* \* \* or the assignee of such a tenant" is alternative or not, are very few and not at all clear.

In *Purton v. Watson*, 19 *St. Rep.* 6, at page 8, it is stated that the action is maintainable against "any tenant for life or years, and the assigns of either, and also against co-tenants and guardians." Also that "a revisioner or remainderman, whether such in fee or for life or years, may, if his residuary interest was 'wasted,' bring either the real action of waste, or a suit for trespass for single damages alone." Thus broadening out the remedy to its fullest possible extent, and allowing it to be prosecuted by any lessee against his sub-lessee, no matter how long the chain of sub-lessees may be. Nor is it even necessary for the owner of the intervening estate to

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FARRINGTON v. ROOT, *et al.*

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,  
DECEMBER, 1894.

§ 635.

*An attachment, when not a trespass—distinction between erroneous, irregular, and void process.*

An action for trespass to property will not lie when the property has been taken under attachment, and the attachment has not been held irregular or void.

When the affidavit upon which an attachment issues, complies, in form, with all the requirements of the code, it is not irregular or void.

Erroneous process, and its avoidance of an action for trespass, as distinguished from an irregular or void process.

An affidavit which leaves undecided the question whether the amount of the indebtedness exceeds the counterclaims, is erroneous and not irregular or void.

(Decided December, 1894.)

Appeal by plaintiff from judgment of trial term dismissing complaint.

*Samuel C. Mount*, for plaintiff, and appellant,

*Charles De Hart Brower and Henry C. Willcox*, for defendants, and respondents.

PRYOR, J.—Under an attachment, the defendants, it is alleged, took or were concerned in taking, the plaintiff's goods. Pursuant to a motion upon the papers on which the attachment issued it was vacated, but it is not apparent in the order that the supersedeas proceeded on the ground that the process was either

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untie with the remainderman as plaintiff. *Van Deusen v. Young*, 29 N. Y. 9. See also *Robinson v. Wheeler*, 25 N. Y. 252.

For the Common-law rule, see *Coke Litt.* 53 B.

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void or irregular. The action in which the attachment issued was upon a promissory note, and against maker and indorser. It was the indorser's goods that were taken and it is he who sues in the present action.

The attachment is challenged as void or irregular because the affidavit fails to show that the plaintiffs are entitled to recover the sum stated, over and above all counterclaims known to the plaintiffs. (*Code Civ. Pro.* § 635.) The affidavit properly by a third person, alleged, on information and belief that "the plaintiffs are entitled to recover from the defendants the sum of about \$1,416.70 with interest, over and above all counterclaims known to the plaintiffs," and that "the source of deponent's information and the grounds of his belief are that his firm has possession of the notes mentioned in the complaint, and of the notarial certificates of demand and notice of dishonor, copies of which are annexed." At the close of the case the complaint was dismissed.\*

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\* Right of attachment is not a common-law right, but exists by virtue of the statute, and its requirements and procedure must be substantially complied with. *Murphy v. Jack*, 76 *Hun.* 356; S. C. 58 *St. Rep.* 481; S. C. 27 *N. Y. Supp.* 802, rev'd on another point; 142 *N. Y.* 215; S. C. 58 *St. Rep.* 458; S. C. 31 *Abb. N. C.* 201.

**Discretionary.**—A plaintiff can not demand an attachment as a right, *Sartwell v. Field*, 68 *N. Y.* 341. Still it is not discretionary in such sense as to prevent a review of the order of the General Term on appeal. *Steele v. Raphael*, 87 *St. Rep.* 623.

**Individual Creditor Benefited.**—The attachment authorized by Sec. 635, is for the benefit of the individual creditor, whereas the former statutory provision, 2 *R. S.* 280, was for the benefit of all the creditors.

**When Warrant may Issue.**—Conversion of personal property:—*Gladke v. Maschke*, 85 *Hun.* 476. In action for liquidated damages for breach of contract, *Clews v. Rockford R. I. & St. L. R. Co.* 2 *Hun.* 879. Also for unliquidated damages, where means are furnished for determining the same, *U. S. v. Graff*, 4 *Hun.* 634. S. C. 67 *Barb.* 304. *Lawton v. Reil*, 84 *How.* 465. Directors of

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The cause has been argued with commendable research and ability, but after all, the question upon which the appeal depends is of obvious and easy solution. The action is for trespass to property. But the chattels were taken under attachment, and, although set aside, the process, unless irregular or void, is a perfect protection to all the defendants (*Marks v. Townsend*, 97 *N. Y.* 590, 597; *Day v. Bach*, 87 *N. Y.* 56, 61; *Fischer v. Langbein*, 103 *N. Y.* 84, 93; 8 *N. E.* 251). Process may be erroneous only, for which, being

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insolvent corporations may issue attachment against the corporations. *Hill v. Knickerbocker E. L. and P. Co.* 18 *N. Y. Supp.* 813. Or against foreign corporation, holding property within the state, although previously dissolved by a decree of the Federal Court. *Bank of Montreal v. Fidelity Nat. Bank.* 17 *St. Rep.* 88; *S. C.* 1 *N. Y. Supp.* 852; *S. C.* 28 *Weekly Digest*, 540.

Fraud in obtaining goods on credit, *Scott v. Simmons.* 34 *How.* 66. Goods sold to defendant under fraudulent representations as to defendant's financial condition. *Whitney v. Hirsch*, 39 *Hun.* 826; see *Fitch v. M'Mahon*, 103 *N. Y.* 690; *S. C.* 4 *St. Rep.* 305, aff'g 3 *St. Rep.* 147. *S. C.* Fraudulent representations constitute an "injury to property." 47 *Hun.* 237. *Campion Card and Paper Company v. Searing*, *S. C.* 14 *St. Rep.* 258. An action to recover balance due for goods sold and delivered, is an action to recover damages for breach of contract, within the meaning of the section. *Hirsch v. Hutchison*, 3 *Civ. Pro. R.* 106; *S. C.* 64 *How.* 866. Where money has been advanced on the faith of forged bills, notes, etc., *Bogert v. Dart*, 25 *Hun.* 895. Against one of several joint debtors, *Stoutenburgh v. Vandenburg*, 7 *How.* 229; *Brewster v. Honigsburger*, 2 *C. R.* 50; *Goll v. Hinton*, 8 *Abb.* 120. Even though no ground for attachment exists against the others. *Brewster v. Honigsburger.* *Goll v. Hinton.* See *Anon.* 1 *Duer.* 632. Section 693, Code. Where money is loaned, induced by fraudulent representations, *Morrison v. Watson*, 23 *Weekly Digest* 286.

When Warrant will not Issue.—An attachment will not lie against an executor or administrator for a demand against his intestate. *Matter of Hurd*, 9 *Wend.* 465. Except where he had made himself personally liable. *Matter of Galloway*, 21 *Wend.* 32. But not against the decedent's estate, 16 *N. Y. Supp.* 387. *Columbus Watch Co. v. Hodenpyl.* In an accounting between part owners of a vessel, *Williams v. Freeman*, 12 *Civ. Pro. R.* 834; *S. C.* 9 *St.*



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the fault of the court, the party is not responsible ; or it may be simply irregular, and so valid until vacated, but when vacated it is no protection, because the fault of the party ; or again, it may be void, and being an absolute nullity from the beginning, it is no justification, even before supersedeas. (*Woodcock v. Bennet*, 1 *Cow.* 711, 735 ; *Day v. Bach*, 87 *N. Y.* 56, 61 ; *Chapman v. Dyett*, 11 *Wend.* 31). "An irregularity in practice may be defined to be the want of adherence

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*Rep.* 378. Nor in an action for breach of promise to marry, *Barnes v. Buck*, 1 *Lans.* 268. Nor in an action to cancel a deed, *Ebner v. Bradford*, 3 *Abb. N. S.* 248. Nor in an action against a non-resident for a conversion abroad, *Knox v. Mason*, 3 *Rob.* 681. Nor in a foreclosure action, 9 *Abb. N. S.* 142. *Van Wyck v. Bauer*. Attachment against the property of a resident debtor not authorized, simply because of his insolvency, 6 *St. Rep.* 643. The fact that a purchaser was insolvent when the debt was created, and omitted to inform plaintiff of his insolvency is not enough to entitle plaintiff to an attachment, *Freeman v. Campbell*, 1 *St. Rep.* 728. Action against common carrier for negligent loss of goods. *Atlantic Mutual Ins. Co. v. McLoon*, 48 *Barb.* 27. When nominal damages only are demanded, 32 *Hun.* 276, *Walts v. Nichols*. No attachment in action for dissolution of partnership, *Ketchum v. Ketchum*, 1 *Abb. N. S.* 157, aff'g 46 *Barb.* 43, S. C. After a replevin suit to recover goods sold on the ground of fraud, no attachment will lie, *Thompson v. Fuller*, 28 *St. Rep.* 4 ; 8 *N. Y. Supp.* 62, S. C. Nor for infringement of trade mark, 9 *Bosw.* 601, *Guilhon v. Lindo*. Nor in action against trustee, 101 *N. Y.* 5, *Thorington v. Merrick*. Under the National Banking Act, (*U. S. R. S.* 5242), an attachment is prohibited and will not issue out of a State court against a national bank which is or is about to become insolvent, *National Shoe & L. Bank v. Mechan. Nat. Bk.* 89 *N. Y.* 467 ; *Horton v. Pacific Nat. Bk.* 16 *Weekly Dig.* 306. Nor against a solvent national bank, 17 *St. Rep.* 88. *Bank of Montreal v. Fidelity National Bank*, S. C. 1 *N. Y. Supp.* 852 ; S. C. 28 *Weekly Dig.* 540. The U. S. Supreme Court is very clear and decisive upon this point and declares it as the paramount law of the land that attachments shall not issue from State courts against national banks. Since the act of 1878 all of the attachment laws of the state must be read as if they contained a provision in express terms, that they were not to apply to suits against a national bank. *Pacific Nat. Bk. v. Mixter*, 124 *U. S.* 721.

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to some prescribed rule or proceeding. And it consists in omitting to do something that is necessary for the due and orderly conducting of a suit, or ordering it in an unreasonable time or improper manner." (*Tidd*, Pr. 512; *Bowman v. Tallman*, 2 Rob. N. Y. 632, 634). In the case before us, the affidavit upon which the attachment issued, complies, in form, with all the requirements of the Code, and the only vice imputed to it is that it did not furnish sufficient evidence to the court of the absence of counterclaims against the debt. This, plainly, was no irregularity. Nor was the attachment void. The court had jurisdiction and the evidence before it presented "a colorable case," and called for a judicial determination whether, apparently, the amount of the indebtedness was in excess of counterclaims. (*Fischer v. Langbein*, *supra*; *Globe Yarn Mills v. Bilbrough*, (*Com. Pleas*, N. Y.) 21 N. Y. Supp. 2). The decision was erroneous, and was rightly reversed; but even so, the process was still a protection to all parties. *Cases supra*; and *Wessels v. Boettcher*, 142 N. Y. 212; 36 N. E. 883 (where observe an instance of the prevalent ambiguity in the use of the word "irregular"). An order founded on an insufficient affidavit is not void, but has vitality enough to support a proceeding for contempt. (*Fleming v. Tourgee*, 16 N. Y. Supp. 2); *a fortiori*, to justify an alleged trespass.

Other points presented by counsel need no consideration. The plaintiff is not without redress, but has only misconceived his remedy. Upon proper allegations and proof, he may maintain an action in the nature of malicious prosecution, (*Burton v. Knapp*, 81 Am. Dec. 476, note). Judgment affirmed with costs.

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The People of the State of New York v.

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THE PEOPLE OF THE STATE OF NEW YORK  
v. TROY STEEL AND IRON COMPANY,  
AMELIA LORTIE, AS ADMINISTRATRIX, ETC., OF  
JEREMIAH T. LORTIE, DECEASED, RESPONDENT,  
v. TROY STEEL AND IRON COMPANY,  
APPELLANT.

SUPREME COURT, GENERAL TERM, THIRD DEPARTMENT,  
DECEMBER, 1894.

§§ 755, 756, 1784, 1785, 1902.

*Appeal from order, by receivers of a corporation—in what name taken—effect of judgment in sequestration action—judgment of dissolution—effect—continuance of action—action against corporation does not abate on its dissolution.*

Where an action is pending against a corporation, and an order is made therein after the dissolution of the corporation, an appeal from such order may be taken either in the name of the receivers of the corporation, or in the name of the corporation.

A judgment in a sequestration action brought by a creditor against a corporation, under the provisions of section 1784 of the Code of Civil Procedure, appointing a receiver, does not dissolve the corporation or prevent the prosecution of actions against it.

A judgment for the dissolution of a corporation and the appointment of a receiver in an action by the people of the State, brought under the provisions of section 1785 of the Code of Civil Procedure, ordinarily has the effect of preventing the maintenance of an action against the corporation; and if actions are pending at the time of the rendition of such judgment they cannot be continued unless by order of the court by whom the judgment was rendered.

Under the provisions of sections 755 and 756 of the Code of Civil Procedure, the same power is now vested in the Supreme Court to continue actions pending against a corporation when it is dissolved under the provisions of section 1785 of the Code of Civil Procedure, as was conferred upon the Court of Chancery by chapter 295, Laws of 1882.

Under section 755 of the Code of Civil Procedure, actions against a

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Troy Steel and Iron Co., etc.

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corporation that do not abate upon its dissolution are those where the right of action survives or continues.

The cause of action given by section 1902 of the Code of Civil Procedure to the representatives of a decedent whose death was caused by the negligence of another does not abate against a corporation upon its dissolution, but may be continued by an order of the court against the receiver of the corporation.

(Decided December, 1894.)

Appeal by the defendant from an order of the Albany Special Term, entered in the office of the clerks of the Counties of Albany and Rensselaer on the 16th of April, 1894, modifying the judgment in the first above-entitled action entered on the 16th of August, 1893, so as to permit the continuance of the second-named action against the receivers of the Troy Steel and Iron Company, and substituting such receivers as the defendants in such action.

The facts are stated in the opinion.

*Thomas S. Fagan, Edward W. Douglas and Frank S. Black*, for defendant and appellant.

*Countryman & Du Bois*, for plaintiff and respondent.

PUTNAM, J.—This action was brought in the month of March, 1893, by the plaintiff, as administratrix, to recover damages for the death of her husband, which the complaint alleged was caused by defendant's negligence.

The defendant, a corporation, was dissolved by a judgment of the Supreme Court in August, 1893, in an action brought by the Attorney-General in the name of the People of the State, and receivers appointed. On plaintiff's motion in March 1894, an order was made at Special Term continuing the action

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The People of the State of New York v. Troy Steel and Iron Co.

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against the receivers, and from such order this appeal is taken.

It is urged by the respondent that as the receivers had not appealed and the corporation is "defunct," the appeal taken in its name should be dismissed; that in fact, there is no appeal now pending; we think plaintiff's position is not well taken.

The receivers could take an appeal either in their own name or in that of the corporation, and hence the appeal under consideration should be deemed that of the receivers in the name of the corporation. (*Talmage v. Pell*, 9 *Paige*, 410.)

It is held that a judgment in a sequestration action brought by a creditor against a corporation, under the provisions of section 1784 of the Code of Civil Procedure, appointing a receiver, does not dissolve the corporation or prevent the prosecution of actions against it. (*Del Valle v. Navarro*, 21 *Abb. N. C.* 136; *Auburn Button Co. v. Sylvester*, 68 *Hun*, 401.)

A judgment, however for the dissolution of a corporation and the appointment of a receiver in an action by the People of the State, brought under the provisions of section 1785 of the Code of Civil Procedure, ordinarily has the effect of preventing the maintenance of an action against the corporation; and if actions are pending at the time of the rendition of such judgment they cannot be continued unless by order of the court by whom the judgment was rendered. (*Sturges v. Vanderbilt*, 73 *N. Y.* 384-388.)\*

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\* On dissolution, all actions then pending against the corporation, must, to be effectual, be revived in the name of the receiver. But this procedure will be rendered unnecessary when the receiver voluntarily makes himself a party to the action, and a judgment recovered against the corporation after this participation by the receiver should be allowed to be proved as a claim against the assets in his hands. *People v. Knickerbocker L. Ins. Co.*, 7 *State Rep.* 287.

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After such a judgment against a corporation, in the language of Field, J., in *National Bank v. Colby* (21 *Wall*, 609-615): "Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man dying *pendente lite*. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless by statute pending suits be allowed to proceed to judgment notwithstanding such dissolution."

By chapter 295, Laws of 1832, it was provided that if a corporation shall have been dissolved by a decree of the Court of Chancery, or by expiration of its charter during the pendency of an action against it, the court shall have power, on the application of either party, to make an order for the continuance of the action, and the same shall be continued until final judgment. The power thus conferred upon the court to continue actions after the dissolution of a corporation, in terms applies to all actions. The statute of 1832 remained in force until 1880, when it was repealed. We are inclined to believe that under the provisions of sections 755 and 756 of the Code of Civil Procedure the same power is now vested in the Supreme Court to continue actions pending against a corporation when it is dissolved under the provisions of section 1785 (*supra*), as was conferred upon the Court of Chancery by chapter 295, Laws of 1832. That the court now possesses that power was decided in the case of *People*

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The receiver of a railroad company is properly substituted as defendant in an action for tort committed by the company before his appointment. *Decker v. Gardner*, 11 *N. Y. Supp.* 888.

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v. The Universal Life Ins. Co. (17 *N. Y. Weekly Dig.* 563.)

In *People v. Knickerbocker Life Ins. Co.* 106 *N. Y.* 619-623), decided after the repeal of the act of 1832, Judge Danforth in his opinion says: "It is, therefore, plain that the funds in his hands should not be affected by it"—the judgment obtained after the appointment of the receiver—"unless by interference or otherwise, under the direction of the court appointing him, he has made himself responsible for the final result of the litigation between the parties. (*M'Culloch v. Norwood*, 58 *N. Y.* 563.) His authority to do the acts relied upon by the respondents was derived from the court from whom he received his appointment, and its exercise was necessary for the protection of property which had come to his hands."

In the above-cited case it will be seen that it was suggested that the receiver, under the direction of the court appointing him, might subject the funds in his hands to the payment of a judgment obtained after his appointment, as was held he could in *M'Culloch v. Norwood*, decided when the act of 1832 was in force.

We think it was intended to confer on the Supreme Court by sections 755 and 756 (*supra*) the same power that was vested in the Court of Chancery by chapter 295, Laws of 1832, and hence the order appealed from was properly granted, unless the action abated on the dissolution of the corporation. Under section 755, actions that do not abate are those where the right of action survives or continues. Whether the action set out in the complaint herein is one that survived the dissolution, the death, of the corporation, is a question as to which we have entertained some doubt.

It is held that the cause of action given by section 1902 of the Code of Civil Procedure to the representa-

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tives of a decedent whose death was caused by the negligence of another abates on the decease of the wrongdoer, and cannot be maintained against his representatives. (*Hegerich v. Keddle*, 99 N. Y. 258.)\*

It is urged with much force that a judgment dissolving a corporation ends its existence; that on the rendition of such a judgment a corporation is extinct, and the same rule as to the survival of cause of action against it should apply as to survival in actions against an individual. In *Greeley v. Smith* (3 *Story*, 657, 658), Judge Story says: "Now, I cannot distinguish between the case of a corporation and the case of a private person dying *pendente lite*. In the latter case, the suit is abated at law, unless it is capable of being revived by the enactments of some statute, as is the case as to suits pending in the courts of the United States, where if the right of action survives, the general representative of the deceased party may appear and prosecute or defend the suit."

As an original question, we should have entertained some doubts whether the cause of action set out in the complaint, the alleged negligence of the defendant in causing the death of the plaintiff's intestate, was one that survived the dissolution of the corporation; and hence whether the court below had the right to continue the action against the receivers. But we have been cited to the opinion delivered by Justice Cullen of the second district in *Hepworth v. Union Ferry Co. of Brooklyn*, in which the learned justice reached the conclusion that an action for assault on a passenger of a ferry company by one of its employes, pending against the corporation on its dissolu-

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\* The right of action given by section 1903, of the Code, did not exist at Common Law. *Green v. Hudson R. R. Co.* 16 *How. P. R.* 280, *S. C. 2 Abb. Ct. of App. Dec.* 277.



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The People of the State of New York v. Troy Steel and Iron Co.

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tion in consequence of the expiration of its charter, survived and could be continued against the trustees of the corporation.\* The decision was affirmed by the General Term of the second department. (62 *Hun*, 257). The appeal from the judgment of the General Term to the Court of Appeals was dismissed (131 *N. Y.* 645). We may assume that if the Court of Appeals had reached the conclusion in the consideration of the case, that the action did not survive, and hence that the court below had no power to continue it, the appeal would probably not have been dismissed. Under the doctrine laid down in *Hepworth v. Union Ferry Co.*, the cause of action set out in the complaint in this action survived the dissolution of the corporation, and the case could be continued against the receivers. Under the authority of that case the order from which the appeal is taken should be affirmed.

MAYHAM, P. J., concurred in result ; HERRICK, J., not acting.

Order affirmed, with ten dollars costs, and printing and other disbursements.

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\* The court in *Hepworth v. Union Ferry Co. of Brooklyn*, 62 *Hun*, 257, does not expressly differ from the rule laid down in *Hegerich v. Keddie*, 99 *N. Y.* 258, and quoted in the opinion (*supra*), but draws a distinction between the death of an individual wrongdoer and the dissolution of a corporation as affecting the right of continuing the action against the representatives of either. The opinion of Judge Barnard contains the following :—"The charter pledges the property of the corporation to pay all damages, for misfeasance of the company's employees. The law makes the directors trustees to settle the affairs of the corporation and to pay all debts against the corporation. The tort stands upon the same basis as a contract. (*Martin v. Walker*, 12 *Hun*, 46 ; *Ford v. Johnston*, 7 *Id.* 563 ; *Baker v. Gilman*, 59 *Barb.* 26.) These cases either hold or approve of the principle that a conveyance made during a pending litigation to defeat the collection of a judgment for a tort can be set aside as if it were a contract debt. In other words the statute creditor embraces those persons whose claims are based upon torts.

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*Hackstaff v. Hackstaff.*

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WILLIAM G. HACKSTAFF AND ANOTHER, AS  
EXECUTORS, ETC., OF ANNA G. HACKSTAFF,  
DECEASED, PLAINTIFFS, v. CHARLES L. HACK-  
STAFF, DEFENDANT.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT.  
DECEMBER, 1894.

§ 829.

*Evidence of a party disqualified under section 829 of the Code, when  
admissible.*

Where, upon the cross-examination of a witness, testimony is received as to parts of certain conversations occurring between himself and testator, such witness, upon his re-direct examination, may testify as to the whole of said conversations notwithstanding the fact that the testimony so given would have been inadmissible under section 829, Code of Civil Procedure, on a direct examination.

(Decided December, 1894.)

MOTION by the defendant, Charles L. Hackstaff, for a new trial on a case containing exceptions, ordered to be heard at the General Term in the first instance upon the verdict of a jury rendered by direction of the court after a trial at the New York Circuit on the 15th day of January, 1894.

The facts are stated in the opinion.

C. A. de Gersdorff, for the plaintiffs.

Charles De Hart Brower, for the defendant.

PARKER J.—A careful examination of the evidence satisfies us that the trial court did not err in directing a verdict for the plaintiffs upon the evidence as

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**Hackstaff v. Hackstaff.**

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it stood at the close of the trial. But several exceptions were taken to the refusal of the court to allow the defendant to testify fully on re-direct examination concerning certain conversations had with the deceased, about which inquiry was made of the defendant on cross-examination.

The ground of the objection was that the evidence was inadmissible under section 829 of the Code of Civil Procedure. So it would have been had not the plaintiffs opened the door for its admission by inquiries of the defendant in respect to it on his cross-examination.\*

The sum in controversy was \$4,491.78. The plaintiffs, as executors of Anna G. Hackstaff, claimed that these moneys belonged to her estate; defendant, that she had given them to him in her lifetime. Those moneys with others were collected by the defendant from tenants of Mrs. Hackstaff during a period of years with her consent. Apparently for the purpose of showing a retention of control over the moneys by the decedent, and thus negating defendant's claim that he held them as a gift, defendant was asked by the plaintiffs on cross-examination whether his mother knew of the account he had in trust for her in the Seamen's Bank, and whether she kept track of the deposits made in defendant's name in trust for her in such bank. Inquiry was also made about conversations between the decedent and witness relating to the payment of taxes on her property, and the saving of money for that purpose. Other subjects of conversa-

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\* A party, on cross-examination, by eliciting a partial disclosure of a transaction not open to proof by his adversary, admits that adversary, on the re-direct examination, to a complete disclosure of the transaction. *Howe v. Schweinberg*, 28 *N. Y. Supp.* 607; 4 *Misc. Rep.* 78.

See *Merritt v. Campbell*, 70 *N. Y.* 625.

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*Hackstaff v. Hackstaff.*

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tion between them, tending in the same general direction, were inquired about, but those already referred to will sufficiently present the error into which we think the trial court fell.

It should be said that counsel insists that the testimony to which we have referred was volunteered by the witness. If such were the fact, it is not disclosed by the record, which we must assume to be correct. The inquiries to which we have referred entitled the defendant to call out the whole of the conversations thus referred to. (*Nay v. Curley*, 113 *N. Y.* 575.) This defendant attempted to do by the following questions: "Q. You were asked on cross-examination in regard to having advised your mother as to the accounts in trust for her. What conversations, if any, did you have with your mother in reference to the accounts in trust? Q. What conversation, if any, did you have with your mother in reference to saving up money for taxes from the Church street rents?"

They were severely excluded, and the exceptions taken to the rulings require a reversal of the judgment; for the court cannot know but that the answers if given might have had a very important, perhaps a controlling, influence upon the question in issue between the parties.

The judgment should be reversed and a new trial granted, with costs to the defendant to abide the event.

VAN BRUNT, P. J. and O'BRIEN, J., concurred.

Judgment reversed, new trial ordered, costs to defendant to abide event.

NOTE ON EXAMINATION OF INTERESTED WITNESSES UNDER SECTION 899.

For an elaborate note, see *Brague v. Lord*, 2 *Abb. N. C.* 8.

Section 899 of the old Code, on which the present section is founded, is substantially the same in meaning except that in the pres-

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Hackstaff v. Hackstaff.

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ent section, the words "upon the trial of an action or the hearing, upon the merits, of a special proceeding," were added so as to render it inapplicable to motions and other interlocutory proceedings, and that the words, "in his own behalf or interest, or in behalf of the party succeeding to his title or interest," were added, so as to overrule a construction, which had been given to section 399 of the former Code, to the effect that the question of competency was the same, whether the witness was called to testify in support of or against his own interest; *Richardson v. Warner*, 13 *Hun*, 13; *Gifford v. Sackett*, 15 *Hun*, 79; *Alexander v. Dutcher*, 70 *N. Y.* 885; *Markell v. Benson*, 55 *How*, P. R. 380. Cases decided under section 399 of the former Code are therefore applicable to this section, unless where they relate to a matter, as to which the meaning of the former provision has been purposely changed, as stated.

**What Interest will Disqualify.**—The words "interested in the event" limited in their application to the particular issue or question as to which witness is to be examined. *Moore v. Oviatt*, 35 *Hun*, 216. *Ehmann v. Scheuerman*, 14 *N. Y. St. Rep.* 705.

The test is, will the witness gain or lose by the direct legal effect of the judgment, or will the record be legal evidence for or against him in some other action, and the interest must be certain and vested, not remote and contingent. *Wallace v. Strauss*, 113 *N. Y.* 233. *S. C.*, 23 *N. Y. St. Rep.* 984. *Connelly v. O'Connor*, 117 *N. Y.* 91.

The wife of plaintiff in an action for specific performance of a contract to convey land is an interested person. *Erwin v. Erwin*, 54 *Hun*, 166. *S. C.*, 18 *Civ. Pro. R.* 11.

Where, in an action for conversion, defendant claimed a lien on property for rent under a law of another State, she cannot testify to the transaction by which the lease was made to plaintiff's grantor. *Hammond v. Schultze*, 45 *N. Y. Supr.* 611.

Beneficiary under will. *Matter of Bernsee*, 141 *N. Y.* 339. *S. C.*, 57 *St. Rep.* 601.

Executor of mortgagee, in partition. *Gennerich v. Ulrich*, 12 *N. Y. Supp.* 353.

Husband and wife. *Hard v. Davidson*, 25 *St. Rep.* 439. *S. C.*, 6 *N. Y. Supp.* 69.

Legatee. *Brigham v. Gott*, 20 *St. Rep.* 420. *S. C.*, 3 *N. Y. Supp.* 518.

Applicant for letters of administration. *Angevine v. Angevine*, 48 *Barb.* 417.

Mortgagor. *Whitehead v. Smith*, 14 *Hun*, 531. *S. C.*, 81 *N. Y.* 151.

Partner. *Hunter v. Herrick*, 26 *Hun*, 272.

Principal and Surety. *Lawton v. Sayles*, 40 *Hun*, 252.

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 Hackstaff v. Hackstaff.
 

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Maker of Promissory Note. *Allis v. Stafford*, 18 *Weekly Dig.* 522.  
 Stockholder in action against Corporation. *Keller v. The West, Bradley & Cary Man. Co.*, 39 *Hun*, 348.  
 Trustee, *Wilkins v. Baker*, 24 *Hun*, 32.

**What Interest will not Disqualify Witness.**—A tenant by the curtesy initiate is not an incompetent witness. *Bowen v. Sweeney*, 22 *C. P.* 79. Agent of wife of one of the parties not prevented from testifying, *Whitman v. Foley*, 36 *N. Y. St. Rep.* 183.

Legatees under a will. *Hard v. Ashley*, 117 *N. Y.* 606. Heir-at-law may testify as to personal transaction with deceased tending to sustain validity of a deed. *Smith v. Meaghan*, 28 *Hun*, 423. Next of Kin, *Matter of Hanley*, 44 *Hun*, 559. *S. C.*, 9 *N. Y. St. Rep.* 76. Husband of devisee, *Bowen v. Sweeney*, 44 *St. Rep.* 182.

Interest must be pecuniary. *Smith v. Meaghan*, 28 *Hun*, 423.

Interest must be present. *Gourlay v. Hamilton*, 41 *Hun*, 487.

Time at which interest must be possessed. *Gross v. Wellwood*, 9 *Reporter*, 587, Brooklyn City Court.

Interest must be vested. *Wallace v. Strauss*, 113 *N. Y.* 238. *S. C.*, 23 *St. Rep.* 984. *Matter of Masterson*, 6 *Dem.* 460. *S. C.*, 19 *St. Rep.* 789.

**Exceptions to Incompetency.**—Admissions of adversary's grantor. *Cole v. Denué*, 8 *Hun*, 610. Contradicting adversary's witness. *Pinney v. Orth*, 88 *N. Y.* 447. *S. C.*, 2 *Civ. Pro. R.* 1. Cross-examination opens the door to a re-direct examination on the same matters. *Howe v. Schweinberg*, 23 *N. Y. Supp.* 607.

See also to the same effect, *In re McQueen's Estate*, 18 *N. Y. Supp.* 663. *S. C.*, 37 *St. Rep.* 601.

Where a party interested testifies to declarations of a deceased person, kindred declarations of deceased are admissible. *Marsh v. Brown*, 18 *Hun*, 319. Proof of declarations of a deceased grantor by competent third persons does not open the door for the admission of what would otherwise be plainly incompetent. *Lyon v. Ricker*, 56 *St. Rep.* 804. *S. C.*, 141 *N. Y.* 225.

Testimony of a disinterested witness does not remove the bar to admit the testimony of an interested party as to the same transaction. *Hard v. Ashley*, 44 *St. Rep.* 792. *S. C.*, 18 *N. Y. Supp.* 413.

Where a party, excluded by the section from testifying, draws out, upon cross-examination of the adverse party, testimony in regard to a personal transaction, this does not bring him within the exception to the prohibition; and, permit him to testify; as in such case the adverse party is not "examined in his own behalf," within the meaning of the exception. *Corning v. Walker*, 100 *N. Y.* 547.

Mother of beneficiary under a will may testify. *In re Ballows' Will*, 23 *N. Y. Supp.* 290. *S. C.*, 51 *St. Rep.* 783.

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Goossen v. Goossen.

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Where the party representing the deceased person has as a witness in his own behalf, given material evidence, the adverse party, although precluded from directly proving the existence of such a transaction or communication, may testify as to extraneous facts tending to controvert such evidence, although those facts may incidentally tend to establish the inference that such a transaction or communication has or has not taken place. *Lewis v. Merritt*, 98 N. Y. 206. See, on subsequent appeal, S. C., 113 N. Y. 386; S. C., 22 St. Rep. 714.

Where plaintiff called defendant, who testified to having written letters in which he stated that his father had given him money, defendant may, on cross-examination, explain the character of the gift to show that it was not an advancement. *Sanford v. Sanford*, 5 Lans. 486. But see *Matter of Eysaman*, 113 N. Y. 62, *Matter of Dunham*, 121 N. Y. 575 S. C., 31 St. Rep. 858. See also *Merritt v. Campbell*, 79 N. Y. 625.

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HERMAN GOOSSEN v. KATE M. GOOSSEN.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
JANUARY, 1895.

§§ 507, 514.

*Counterclaim not permitted in the reply.*

Section 514 of the Code of Civil Procedure does not permit a plaintiff to counterclaim upon a cause of action unconnected with the cause of action pleaded as a counterclaim by defendant.

Such counterclaim, when contained in the reply, will be stricken out on motion.

(Decided January, 1895.)

Motion by defendant to strike out of reply, a counterclaim set up against a counterclaim pleaded by defendant in his answer.

*Langbein Brothers and Langbein*, for the motion.

*M'Koon and Luckey*, opposed.

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DALY, C. J.—The counterclaim set forth in the reply does not arise upon any transaction pleaded in the answer, but upon an independent cause of action in favor of plaintiff against defendant which would not be barred by an adjudication upon the issues raised by the answer.

Section 514 of the Code prescribes what a reply must contain, viz.: "Where the answer contains a counterclaim, the plaintiff, if he does not demur, may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim." This provision does not authorize a counterclaim in express words, nor is any authorized by implication from the permission granted to plead "new matter constituting a defense to the counterclaim," for new matter constituting a defense is distinguished in the Code from new matter constituting a counterclaim. Thus, in section 500, prescribing the contents of the answer, it is provided: "The answer of the defendant must contain (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition." And in section 507 it is provided: "A defendant may set forth in his answer as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each de-



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fense or counterclaim must be separately stated and numbered." Therefore the omission of the term "counterclaim" from the prescribed contents of the reply must be taken as conclusive of the intention of the Legislature that counterclaims should cease with the answer, and that the plaintiff should be left to a new action upon any independent cause of action in his favor.\*

If the plaintiff were permitted to reply a counterclaim upon an independent cause of action, as against a counterclaim set up in the answer, then it would seem but just to allow the defendant, upon the trial, to defend by counterclaiming upon an additional cause of action in his favor; yet this practice was discountenanced by the Supreme Court (*Breed v. Podget*, 14 *Weekly Dig.* 574). I am of opinion that if the plaintiff has an offset to the defendant's counterclaim, growing out of the same transaction which constitutes the basis of the defendant's counterclaim, and which would be barred by an adjudication in favor of such counterclaim if the latter were the subject of an independent action, then in such case the offset might be pleaded as a full or partial defense in the reply; for the plaintiff is compelled to this course by the defendant's claim. For

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\* That a counterclaim in the answer may be met by one in reply, see *Miller v. Loese*, 9 *How. Pr.* 356; *Houghton v. Townsend*, 8 *How. Pr.* 441; *Stewart v. Travis*, 10 *Id.* 148; *Allen v. Paterson*, 7 *N. Y.* 476; *Devlin v. Bevins*, 23 *How. Pr.* 390; *Kain v. Dickel*, 46 *Id.* 208; *Hall v. Hall*, 80 *Id.* 51.

That it may not, see *White v. Joy*, 13 *N. Y.* 83, 90; *Cohn v. Husson*, 66 *How Pr.* 150; *Hatfield v. Todd*, 13 *Civ. Pro. R.* 265.

Where a reply improperly contains counterclaims, the remedy is by motion to strike them out and not by demurrer. Demurrer is only authorized against new matter not pleaded as a counterclaim. *Hatfield v. Todd*, 13 *Civ Pro. R.* 265.

So with all irrelevant matter. *Ludington v. Slauson*, 33 *N. Y. Supr.* 81.

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that reason was the counterclaim allowed in *Rider v. Foggan* (37 *N. Y. St. R.* 438), growing out of the partnership dealings which defendant set up by way of counterclaim in the answer.

I am aware that in *Miller v. Losee* (9 *How. Pr.* 350, *Erie Sp. Term*, 1854) it was held that the plaintiff might reply another cause of action as a set-off and defense to the defendant's set-off, and that that decision was followed in *Stewart v. Travis* (10 *How. Pr.* 148, *Washington Co. Sp. T.*, 1854) and in *Hall v. Hall* (30 *How. Pr.* 51, *County Court of Otsego Co.*, 1865), and that the same view is taken in *Rumsey's Practice* (Vol. I, p. 373), *Wait's Practice* (Vol. II, p. 44?), and in *Whittaker's Practice* (Vol. II, p. 197); but the contrary opinion was expressed by Barrett, J., in *Hatfield v. Todd* (13 *Civ. Pro.* 265 *Supreme Ct. Sp. T.*, 1887), following McAdam, J., in *Cohn v. Husson* (66 *How. Pr. R.* 150, *City Court of N. Y. Sp. T.*, 1883).

With this conflict of authority upon the question involved it is necessary to recur to the language of the Code and adopt a construction which seems to accord with the intention of the framers of the law, which, for the reasons above given, I infer to be against the right of a plaintiff to counterclaim upon a cause of action unconnected with the cause of action pleaded as a counterclaim by defendant.

Motion to strike out counterclaim from reply granted. No costs.

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Mead v. Hartwell.

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CHARLES E. MEAD AND OTHERS, RESPONDENTS,  
v. H. EDGAR HARTWELL AND OTHERS,  
APPELLANTS.

NEW YORK COURT OF COMMON PLEAS, GENERAL  
TERM, JANUARY, 1895.

§ 3165.

*Summons in City Court.*

An order granted by the City Court requiring a defendant to answer in a shorter time than the usual six days, must specify the exact number of days.

Where the summons based upon an order (defective in this respect) states the exact number of days within which defendant must answer, it does not "correspond with the order" within the meaning of § 3165 of the Code of Civil Procedure, and is therefore defective.

(Decided January, 1895.)

Appeal from an order of the General Term, affirming an order of Special Term, denying a motion to vacate an order shortening the time to answer.

The facts are stated in the opinion.

*Herman F. Koefke*, for defendants and appellants.

*A. S. Cassedy*, for plaintiffs and respondents.

PRYOR, J.—The appeal is from an order of the General Term of the City Court affirming an order at Special Term denying a motion to vacate an order shortening the time to answer.

On due proof of the non-residence of the plaintiffs, an order was entered directing "that the time in the summons within which the defendants are required to

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answer shall be and the same is hereby shortened to not less than two days after service of the summons." Accordingly, a summons issued requiring the defendants to answer "within two days" after service.

Regularly the summons must require an answer within six days; but in case the plaintiff or defendant resides without the City of New York, a Justice of the Court may by order direct "that the defendant be summoned to answer within a shorter time, *specified therein*, not less than two days after the service of the summons, *whereupon the summons must correspond with the order*" (Code of Civ. Pro. § 3165). The provision, being for acquisition of jurisdiction, must be strictly complied with.

Manifestly, the order fails to conform to the mandate of the Code, in that it omits to specify the exact time, less than six days, within which the defendants were to answer. The requirement of the order is merely that the summons shall cite the defendants to answer within a period "not less than two days"; but whether they are to answer, on the third, fourth, fifth or sixth day after service of summons is not specified in the order. The order leaves with the plaintiffs the privilege of designating the time within which the defendants shall answer, with the restriction only that they be summoned to answer within "not less than two days." Accordingly the plaintiffs summoned the defendants to answer "within two days."

But, the Code prescribes that the Court shall specify the shorter time (than six days) within which the defendants should be summoned to answer. The order was the only authority for the issuance of the summons: and as the order failed to define the period within which the defendants were to answer, the con-

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clusion is that the plaintiffs were powerless to supply the omission.

Clearly, the summons does not "correspond with the order"; for the one does, and the other does not, limit the time for answering.

It is not to be argued that the objection urged by the appellants is merely technical. Legal procedure is a system of technicalities, the observance of which, especially upon points of jurisdiction, is indispensable to the orderly administration of justice.

Order reversed, with costs.

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UNION INSURANCE COMPANY OF PHILADELPHIA, *et al.* v. CENTRAL TRUST CO. *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,  
FEBRUARY, 1895.

§ 2384.

*Revocation of submission—stipulation destroyed thereby.*

Under section 2384 of the Code of Civil Procedure, a party to a submission who revokes the same, is chargeable in an action by any other party to the submission with all costs and other expenses incurred by the latter in preparing for the arbitration.

Where a stipulation as to the compensation of the arbitrators has been entered into by the parties, it is deemed to form a part of the submission, and being predicated upon a continuance and completed execution of the agreement, is destroyed by either party's revocation.

(Decided February 11, 1895.)

Action by plaintiff to recover costs and expenses incurred by him in preparing for an arbitration up to the time of the revocation of same by defendants.

The facts are stated in the opinion.

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*Evarts, Choate, & Beaman*, attorneys for plaintiffs.

*Butler, Stillman, & Hubbard*, attorneys for defendants.

BRECKMAN, J.—The complaint in this action was demurred to on the ground of insufficiency by the defendant corporations, and the demurrer was overruled at Special Term, where it was tried before Mr. Justice Van Brunt. On appeal to the General Term the judgment entered upon the decision below was affirmed (*Union Ins. Co. v. Central Trust Co.*, 36 *N. Y. State Rep.* 435). The demurrants, availing themselves of permission so to do, thereupon interposed answers to the complaint, and the issues thus joined have now been brought to trial. The evidence offered sustains all the allegations of the complaint, and the case therefore presents the same legal aspect it had when the demurrers were tried. In view of this no other course is open to me except to direct judgment for the plaintiffs upon the basis of a controlling decision which has declared the law of this case. It is contended, however, that there is one question which affects the extent of the plaintiffs' recovery that was not passed upon or involved in the decision at General Term. The point so raised may be stated as follows: By the terms of the arbitration agreement it was provided that the compensation of the arbitrators and their expenses, and the expenses of witnesses, should be borne and paid by the parties thereto in the following proportion, to wit: One-fourth thereof by the Union Insurance Company; one-fourth thereof by the Insurance Company of the State of Pennsylvania; one-fourth thereof by the Continental Insurance Company, and one-fourth thereof by Lorenzo Dimick;

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“the same to be advanced from time to time in the proportion above mentioned upon the certificate of the arbitrators or a majority of them ; the expenses of witnesses to be adjusted and allowed by the arbitrators or a majority of them.” The agreement also contained a stipulation fixing the compensation of the arbitrators, and providing that no part of the costs and expenses of the arbitration or of witnesses should be recovered by the prevailing party or parties or be entered in the judgment, and that any limitation by statute as to the rate of such compensation was waived. It is now contended that this portion of the agreement is still operative, so far at least as to limit the recovery of the plaintiffs, if they are entitled to recover anything, to one-fourth of the following items of expense, namely: Fees of arbitrators, counsel fees and witnesses’ fees, and expenses. I think, however, that the decision upon the demurrer necessarily involves the negative of this view. The stipulation relied upon forms a part of the submission which has been revoked, and, as its terms clearly show, was predicated upon a continuance and completed execution of the agreement. It was in effect inconsistent with revocation, and therefore destroyed by revocation. The claim of the plaintiffs, as I understand it in the light of the decisions at Special and General Terms, is for the damages recoverable under section 2384 of the Code of Civil Procedure against the revoking party, and also against his sureties, if any, upon the submission or any instrument collateral thereto. These damages are specified in the section to be “all the costs and other expenses, and all the damages which he has incurred in preparing for the arbitration and in conducting the proceedings to the time of revocation.” The cause of action does

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not arise upon the agreement; on the contrary it is outside of it, and comes into existence as the consequence of the act of revocation, by virtue of a statute which in creating it also measures the extent of the recovery. The statute rests upon the principle that the revoking party, *ex debito justitiae*, should make good to the other damages suffered through expenditures rendered fruitless by the act of revocation.\* This liability extends to the security given by the revoking party, under a collateral agreement or otherwise, to secure the performance of the award, and although such agreement may not in terms provide for the payment of the expenses of the award or of the arbitration, "the law," to quote from the opinion at Special Term upon the demurrer, "has stated that where any such obligation is entered into, the obligor, in case of a revocation of the submission, becomes liable to pay the expenses of the party who is not at fault, and the contract between the parties is to be construed in view of the provisions of the statutes governing such instruments." The plaintiffs, therefore, seem to be entitled to the full measure of recovery prescribed by the section of the Code above referred to. The items of damage proven on the trial come within the allowance, and amount in the aggregate to the sum of \$49,178.45. It follows from what has been said that the plaintiffs are entitled to have judgment against the defendants that the five hundred shares of the capital stock of the New York and Harlem Railroad Company held by the defendant, the Central Trust Company, as set forth in the agreement

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\* Section 2384 creates against one who revokes an agreement to arbitrate an implied contract to pay to his adversary the costs, expenses, and damages previously incurred by reason of the breach of the contract. *Kent v. Crouse*, 5 *State Rep.* 141.



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of submission, is subject to a charge in favor of the plaintiffs for the payment of the sum of \$49,178.45, and interest within the limit of \$50,000; and that the stock be sold, and the plaintiffs paid the amount of their claim, within the limit mentioned, out of the net proceeds of such sale. Costs of this action are awarded to the plaintiffs against the answering defendants.

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JOSEPH J. KITTEL, APPELLANT, v. HENRY  
STUEVE, RESPONDENT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,  
FEBRUARY, 1895.

§§ 14, 1240, 1241.

*Contempt of court—when attachment therefor will not lie.*

Punishment as for a contempt, cannot be inflicted for disobeying a final judgment in cases where an execution can issue; and where the judgment is divisible, part being enforceable by execution and part not, attachment will lie only for disobedience of that part which is not enforceable by execution.

*People ex rel. Borst v. Grant*, 41 *Hun*, 351, 355, discussed and followed. (Decided February, 1895.)

Appeal from order of Special Term, denying a motion to punish defendant for a contempt of Court in refusing to obey a final judgment.

The facts are stated in the opinion.

*John A. Straley*, for plaintiff and appellant.

*Frederick W. Hinrichs*, for defendant and respondent.

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GIEGERICH, J.—This action was brought to require the defendant to specifically perform his contract for the purchase of certain real property. The trial of the issues resulted in a decision in favor of the plaintiff, and judgment was entered directing that the defendant accept a deed of the premises in controversy; that he pay on delivery of said deed the balance of the purchase price to be paid on delivery thereof, pursuant to the terms of said contract, in cash, to wit, the sum of \$2,675, and in addition thereto the sum of \$2,975, which would have become due under said bond and mortgage if executed as provided in said contract, making in all a cash payment of \$5,650, with interest thereon; that upon the delivery of the said conveyance he accept the same and deliver to the plaintiff a bond and mortgage to secure the balance of the purchase price, the form of said bond and mortgage to be settled and approved by one of the Judges of this Court in case the parties differ respecting it; and that he pay all taxes and assessments against said premises that may have become liens thereon since the 25th day of July, 1892, the date the title to said premises should have passed. And the judgment also provides that the plaintiff recover of the defendant his costs and disbursements, amounting to \$409.40, "and that plaintiff have execution therefor."

Upon the defendant's alleged refusal to obey the judgment, the plaintiff instituted these proceedings at Special Term to punish the defendant for a contempt, and the application was denied, "with leave to renew if, upon a proper demand with respect solely to the acceptance of the deed and execution of the bond and mortgage in the judgment mentioned, defendant refuses to perform as directed by the judgment in

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the particulars.”\* The moving papers failed to show that a deed and bond and mortgage were in fact tendered ; but tender of the deed and of the bond and mortgage for execution having been conceded, the Court below held that “ the execution of the bond and mortgage may be enforced by attachment, but not the payment of the balance of the contract price, for judgment therefor can be docketed and such judgment can be enforced by execution.”†

The plaintiff did not renew the motion, but brought on this appeal.

The power to punish a party for a contempt for the non-payment of a sum of money ordered or adjudged by the Court to be paid, has been restricted by subdivision 3 of sec. 14 of the Code of Civil Procedure to cases where by law execution cannot be awarded for the collection of such sum. And the same restriction has been preserved by sec. 1241 of the Code (Jacquin v. Jacquin, 36 *Hun*, 378, 380). These restrictions are not affected by subdivision 4 of the latter section, for that permits the punishment for a contempt only where the judgment requires the payment of money into Court or to an officer of the Court (Jacquin v. Jacquin, *supra* ; People *ex rel.* Borst v. Grant, 41 *Hun*, 351, 355).††

The judgment entered in this action being a final one, it is evident from an examination of the pro-

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\* Where judgment required a party to execute a deed or an assignment, it is enforceable by proceedings as for contempt. *Hilliker v. Hathorne*, 5 *Bosw.* 710 ; *Morris v. Walsh*, 14 *Abb.* 887.

† The Court may, however, interpose in aid of that process while resistance is made or threatened to the duty imposed upon the Sheriff. *De Lancey v. Piefgrass*, 141 *N. Y.* 88.

†† For a note on the power of the Court to enforce and superintend the proper execution of its adjudications, see 25 *Abb. N. C.* 268.

The exercise of the power is discretionary with the court. *Cochrane's Ex'r v. Ingersoll*, 78 *N. Y.* 618.

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visions of the Code relative to proceedings for the punishment of a contempt, that subdivisions one and two of sec. 1241 alone apply to the case at bar, subdivision three of the same section relating exclusively to an interlocutory judgment, and subdivision four, as before shown, relating to judgments for the payment of money into Court, or to an officer of the Court.

As the directions contained in the judgment for the payment of moneys are not "mandates" (*Jacquin v. Jacquin, supra*), the provisions of subdivision three of section 14 of the Code (*supra*), therefore, have no application.

In either of the following cases a judgment may be enforced by contempt proceedings :

"1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.

"2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section ; in which case the part or parts which cannot be so enforced as prescribed in this section "

\* \* \* (*Code of Civ. Pro. sec. 1241*).\*

Section 1240 prescribes : "In either of the following cases a final judgment may be enforced by execution :

"1. Where it is for a sum of money in favor of either party, or directs the payment of a sum of money.

"2. Where it is in favor of the plaintiff, in an action of ejectment, or for dower.

"3. In an action to recover a chattel where it awards a chattel to either party."

The result of a careful examination of the authori-

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\* The effect of sections 1240, 1241, is to render any other process or "direction" for the enforcement of a judgment for the payment of money, except an execution, illegal. *People ex rel. v. Riley*, 25 *Hun*, 587.

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ties in relation to this subject is that we are convinced it has become well established by the frequent decisions in the courts of the State that punishment as for a contempt cannot be inflicted for disobeying a final judgment in cases where an execution can issue.

Plaintiff's counsel insists that an execution could not be issued upon the direction contained in the judgment as to the payment of taxes and assessments. This objection is, however, merely as to form and not substance. If there be any defect, the same may be cured by amendment. The amount of the taxes and assessments have been fixed and could have been ascertained upon inquiry at the proper office, and by his failure to insert the same in the judgment the plaintiff acquired no right to punish the defendant for a contempt (*Myers v. Becker*, 95 N. Y. 486). But the direction referred to is, in our opinion, sufficient, if not for the purpose of issuing an execution, then, at least, to defeat the present application in respect thereto (*Matter of Hess*, 48 Hun, 586). In the case last cited the order directed the payment of a certain sum of money, also "the fees of the referee and stenographer and such other disbursements as have been made or necessarily incurred in said accounting to be taxed by the clerk on notice, and also the interest on the sum awarded"; and the Court held that the order was capable of enforcement by execution under section 1240 of the Code, and that punishment as for a contempt could not be inflicted for disobedience of the cause.

As the directions contained in the judgment for the payment of the moneys were capable of enforcement by execution, and as the willingness of the defendant to comply with the remaining provisions of the judgment has not been questioned upon this ap-

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peal, it is apparent that the order appealed from was proper.

Plaintiff's counsel insists "that the execution of the deed, the bond and mortgage, the payment of the balance of the purchase price and the payment of the taxes are indivisible acts constituted together 'specific performance' of the judgment and cannot be separated for the purpose of defeating this application"; but this contention is effectually answered by the provisions of subdivision two of section 1241 of the Code, above cited, which expressly authorize such a separation to be made, and the right to do so was distinctly recognized in *People ex rel. Borst v. Grant* (*supra*), in which the complaint alleged that the defendant had obtained from the plaintiff by means of false and fraudulent representations her promissory note for \$100, and also the sum of \$300 as a deposit to secure the payment of the rent reserved by a lease mentioned in the complaint. The judgment directed the return and cancellation of the note and for the return of said sum of \$300, and also for damages to the amount of \$4,468.71. Upon his failure to comply with the provisions of the judgment, the defendant was adjudged guilty of contempt, a fine being imposed on him and directions were given for his imprisonment until the delivery and cancellation of the note for \$100 by him, and until he should pay said sum of \$300. Upon appeal to the Supreme Court, First Department, it was held that the failure of the defendant to comply with the direction to pay over the \$300 to the plaintiff did not justify his punishment as for a contempt, as the judgment therefor could be enforced by an execution issued thereon, and that as to his failure to deliver up the note for cancellation his imprisonment to that extent was legally directed. And this brings up the

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point so strongly urged by the plaintiff in the court below, "that unless plaintiff can have attachment for refusal to pay the money directed to be paid by the judgment he may lose it, because defendant may accept the deed, give the mortgage, and, after refusing to pay the cash balance, dispose of the property and leave the plaintiff remediless"; but the learned Chief Judge said in this connection: "This fear is groundless; the plaintiff docket his judgment for the money and it becomes a lien upon the property as soon as the deed is delivered and the title exists in defendant."

This exposition of the law, as it exists, as to the remedies of the plaintiff in the case, appears to us to be correct. If the remedies provided for by the provisions of the Code of Civil Procedure are not sufficient the Legislature should be appealed to for the remedy, as the Courts can only apply the laws as made by it, and not make them.

For these reasons the order appealed from should be affirmed, with costs.

BOOKSTAVEN, P. J., and BISCHOFF, Jr., J., concur.

Order affirmed, with costs.

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Boyd v. Boyd.

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DAVID BOYD, AS ADMINISTRATOR, ETC., PLAINTIFF  
AND APPELLANT, v. ROBERT BOYD, DEFEND-  
ANT AND RESPONDENT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,  
FEBRUARY, 1895.

§ 997.

*Motion for a new trial—must be made on a case prepared and settled.*

Where a motion for a new trial is based upon the ground of newly discovered evidence, a case must be made, settled, and signed by the Judge or referee before whom the action was tried, and the motion will not be heard upon affidavits only.

The provisions of § 997 of the Code of Civil Procedure are imperative and prescribe that a case must be made, settled, and signed by the Judge, in conformity with the General Rules of Practice, and such requirement will not be departed from except in a case where the motion is heard without objection upon the pleadings in the action, and the affidavits of the parties relating to the history of the trial.

Russell v. Randell (123 N. Y. 438, 439), approved.  
(Decided February, 1895.)

Appeal by the plaintiff from an order of the General Term of the N. Y. City Court, affirming an order of the Special Term, granting a new trial to the defendant on the ground of newly discovered evidence.

This action was brought upon a judgment. The defense was payment and the action resulted in a direction by the Court at Trial Term of a verdict in favor of the plaintiff. Thereafter the defendant moved at Special Term, before the same Judge who had presided at the trial, for a new trial on newly discovered



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evidence, which motion was granted, and upon appeal to the General Term of the City Court, the order entered thereon was affirmed, from which order of affirmance the plaintiff has appealed.

All further material facts are stated in the opinion.

*Edward W. S. Johnson*, for plaintiff and appellant.

*Henry Daily, Jr.*, for defendant and respondent.

GIEGERICH, J.—The reversal of the order appealed from is sought solely on the ground that the Court below had no authority to make the same. Under these circumstances we think the order should be reviewed in this Court (*Russell v. Randell*, 123 N. Y. 436, 438).

It is urged by the appellant that the Court below had no power to entertain the motion, because it was not made upon a case proposed and settled.

The rule must be regarded as well settled that where a motion for a new trial is based upon the ground of newly discovered evidence, a case must be made, and the motion will not be heard upon affidavits only (*Code of Civ. Pro.* § 997; *Anonymous*, 7 *Wend.* 331; *Sproul v. T. R. F. Ins. Co.*, 1 *Lans.* 71; *Leary v. Roberts*, 8 *Abb. Pr.* 315; *Warner v. W. T. Co.*, 5 *Robt.* 499; *Russell v. Randell*, 30 *N. Y. St. Rep.* 452; 123 *N. Y.* 436; *Michel v. Colegrove*, 46 *Id.* 899; *Holmes v. Evans*, 37 *Id.* 369; *Thayer M'fg Co. v. Steinan*, 58 *How. Pr.* 123; *Bantleon v. Meiner*, 81 *Hun.* 162, 2 *Rumsey's Pr.* 413; *Baylies on N. T. & App.* 524).

Section 997 of the Code provides that where a party intends to move for a new trial of an issue of fact, "he must except as otherwise prescribed by law, make a case, and procure the same to be settled and signed by the Judge or referee by or before whom

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the action was tried as prescribed in the General Rules of Practice." We have not been referred to nor are we aware of any other provision of law, and we therefore conclude that the above are the only ones which apply to the question under consideration.

These statutory provisions are declaratory of the practice as it existed before either Code went into effect; and it was held in *Bantleon v. Meiner* (*supra*) that they are imperative, and that there was no provision of law which relieved a motion of this character from the operation of these provisions of the Code, unless, as was the case in *Russell v. Randell* (*supra*), the motion was heard without objection upon the pleadings in the action and the affidavits of the parties relating to the history of the trial.

In the case before us the appellant at the very outset took the same position as contended for by him upon this appeal, and maintained it throughout the entire proceeding in the Court below; and when the motion came on for hearing he filed an affidavit protesting against the hearing of the motion on the ground, among others, that it was not made upon a case prepared and settled in conformity with the provisions of section 997 of the Code.

It thus clearly appears that the appellant, at all times, insisted upon his legal rights, which he did not, in our opinion, waive, for the reason assigned by the General Term of the Court below upon affirming the order, viz.: That the appellant did not dispute and the Judge who tried the cause asserted the correctness of the transcript of the entire evidence and proceedings taken at the trial, which formed part of the motion papers, this being deemed "a sufficient settlement under the peculiar circumstances of the case."

There is no suggestion here that a case was made,

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and was settled and signed by the trial Judge in conformity with the General Rules of Practice (in fact there was no signature at all of the trial Judge); nor that the appellant consented to a settlement of a case; nor that the appellant consented to have the motion heard upon the papers which were read in support of the motion.

In the absence of either of these elements we conclude, in the light of the above cited provisions of the Code, the General Rules of Practice (rules 32-34) and the decisions construing the same, that the Court below had no authority to entertain the motion, and hence the order was unauthorized.

In arriving at this conclusion we deem it meet and proper to state that we have not overlooked the dictum in *Russell v. Randell* (123 N. Y. 438, 439), that the necessity for a history of the proceedings must appear to the Court; but that we base our decision solely upon the requirements of section 997 of the Code, which, in our opinion, alone govern applications for a new trial upon newly discovered evidence.

There were other points urged by the appellant, but in view of the opinion above expressed we are dispensed from a consideration of the same.

For these reasons the order appealed from should be reversed, with costs, but with leave to renew upon payment of the costs of both appeals.

Order reversed with leave to renew upon payment of the costs of both appeals.

BOOKSTAVER, P. J., and BISCHOFF, JR. J., concur.

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Ladenburg v. Commercial Bank of Newfoundland.

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LADENBURG v. COMMERCIAL BANK OF NEW-  
FOUNDLAND.

SUPREME COURT, SPECIAL TERM, N. Y. COUNTY.  
FEBRUARY, 1895.

§ 1780.

*Attachment against foreign corporation—affidavit setting up jurisdictional facts may be filed nunc pro tunc.*

Section 1780 of the Code of Civil Procedure prescribes that, in order to justify the issuing of an attachment against a foreign corporation, it must affirmatively appear that the plaintiff is either a resident of this State, or if a non-resident, that the action is brought to recover damages for a breach of a contract made within this State, or that the action related to property within this State, or that the cause of action arose within this State; and where any of the facts so required do not appear, the attachment is therefore irregular, and will be vacated upon motion.

Where, however, the jurisdictional facts exist, but, through inadvertence, one of them is omitted in the affidavits, which is necessary to bring the case within section 1780 of the Code of Civil Procedure, the Court has the power to permit an affidavit, setting forth such fact, to be filed *nunc pro tunc*, as of the date of the granting of the attachment.

(Decided February, 1895.)

Motion by defendant to vacate an attachment.

*Mapes & Kelly*, for the plaintiff.

*Steinhardt & Goldman*, for the defendant.

INGRAHAM, J.—The General Term of this Court has decided in a number of cases that in order to justify the issuing of an attachment against a foreign corporation it must affirmatively appear that the plaintiff

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is either a resident of this State, or if a non-resident, that the action is brought to recover damages for a breach of a contract made within this State, or that the action related to property within this State, or that the cause of action arose within this State, to comply with section 1780 of the Code of Civil Procedure; and that where any of the facts, as required by section 1780 of the Code did not appear, the attachment was therefore irregular and would be vacated upon motion (see *Smith v. Union Milk Co.*, 70 *Hun*, 348; *Talcott v. Am. Cred. Indemnity Co.*, 81 *Hun*, 577). This rule having become thus settled in this Department, whatever my individual opinion may be, I do not feel at liberty to disregard it. I am aware that a serious question has been presented as to the power of the Legislature to restrict the jurisdiction of the Supreme Court, and that doubt is well expressed by Mr. Justice Parker in his opinion delivered at the General Term in *Selser Brothers v. Potter Produce Co.* (77 *Hun*, 315). Subsequent to the decision of that case, however, *Talcott v. Am. Cred. Indemnity Co.* (*supra*) reaffirmed the rule before established. In *Robinson v. Oceanic Steam Navigation Co.* (112 *N. Y.*, 322, 323) the Court of Appeals appears to have held that an action by a non-resident plaintiff against a foreign corporation can be maintained only in the cases specified.\* The attention of the Court, however, was not called to the limitation of the power of the Legislature to restrict the jurisdiction of the Supreme Court in cases over which it had jurisdiction prior to the adoption of the Constitution. If the Legislature had power thus to

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\* At common law and before the statutes of this State on the subject, a foreign corporation could not be sued in any case in the Courts of this State, unless it saw fit to voluntarily appear in the action. *Hann v. Barnegat, and L. B. Imp. Co.*, 7 *Civ. Pro. R.* 222.

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restrict the jurisdiction of the Supreme Court over actions against foreign corporations, I can see no reason why it would not have power to restrict such jurisdiction over domestic corporations, or any other actions against individual defendants, and thus seriously restrict the jurisdiction of the Supreme Court; while over actions in the Superior City Courts it has been expressly held that the Legislature had no power to restrict their jurisdiction (*Popfinger v. Yutte*, 102 N. Y. 39). I should hardly feel at liberty, however, in view of the former decision of the General Term of this Court and of the Court of Appeals, to hold this provision of the Code unconstitutional. The question was also presented on this motion as to the power of the Court to allow a person obtaining an attachment, which the Justice should not have granted because of a failure to allege the facts of the residence of the plaintiff, to file an affidavit *nunc pro tunc* setting up such fact. In the case of *Adler v. Order Am. Frat. Circle of Baltimore* (22 Civ. Pro. Rep. 337), on a motion to vacate an injunction, I expressed the opinion that this failure to state the facts was jurisdictional and could not be cured by amendment.\* The question was not directly presented there as to whether the Court would have power to allow an affidavit setting up a fact that existed and which would give the Court jurisdiction over the subject matter of the action to be filed *nunc pro tunc* as of the date of the granting of the attachment. The claim of the moving party here is that, as it did not appear that the Court had jurisdiction of the cause or of the subject matter of the action, the attachment was improperly granted; and that is because of the provision of section 1780 of the Code,

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\* Contra, see *Gurney v. Grand Trunk Ry. Co.*, 18 St. Rep. 645.

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which provides that the Courts of this State shall have jurisdiction as against foreign corporations only in the cases specified in the section. If the facts existed which brought the case within one of those mentioned in the section, then the Court has jurisdiction over the subject matter of the action, and therefore has jurisdiction to issue the attachment. No section of the Code provides that to justify a Judge in granting an attachment the facts showing jurisdiction should be presented to him, and the general rule of law applies, that the jurisdiction of a superior Court must always be presumed. Where, therefore, the facts existed which gave the Court jurisdiction of the subject matter of the action, and where a cause of action was stated in the affidavits, but through inadvertence a fact was omitted which would show that the case was one of those mentioned in section 1780 of the Code, and when, as a fact, the Court did have jurisdiction of the subject matter of the action, I can see no reason why the Court has not the power to allow an affidavit setting forth that fact to be filed *nunc pro tunc* as of the date of the granting of the attachment. And if the plaintiff here presents such an affidavit showing that the jurisdictional facts existed when the action was commenced, I will allow it to be filed *nunc pro tunc* as part of this motion. In case such an affidavit be filed the motion will be denied; if no such affidavit be filed, then the motion will be granted. In either case I will grant a stay of all proceedings pending an appeal.

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Dienst v. McCaffrey.

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ADAM P. DIENST, *et al.* v. WILLIAM H. McCAF-  
FREY, *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
FEBRUARY, 1895.

§ 66.

*Attorney's lien—creditor in supplementary proceeding.*

An attorney's lien on a judgment for his costs and compensation, though without notice, prevails over the lien of the creditor in a supplementary proceeding against the party recovering the judgment.

(Decided February, 1895.)

Motion by defendants' attorney to vacate an order requiring a third party to pay over to plaintiffs the amount of a judgment held against him by defendant.

The facts, so far as they affect the decision, are stated in the opinion.

*James Kearney*, for the motion.

*J. Homer Hildreth*, opposed.

PRYOR, J.—An attorney's lien on a judgment for his costs and compensation, though without notice, prevails over the lien of the creditor in a supplementary proceeding against the party recovering the judgment. Upon the examination of a third party in a supplementary proceeding, it was discovered that the execution debtor held a judgment against him, and thereupon an order was entered requiring him to pay



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 Estate of Wilson G. Hunt.
 

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the judgment in satisfaction of the execution creditor. The attorney who procured the judgment now intervenes with a motion to vacate that order and to protect his lien. The judgment against the third party is of course available only to the extent of the execution debtor's interest in it. The attorney has a lien on the judgment for the amount of his costs and compensation (*Washburn v. Mott*, 12 *Suppl.* 111; *Guliano v. Whitenback*, 62 *N. Y. St. Rep.* 84; *Lee v. Oil Co.*, 126 *N. Y.* 579; *Albert Co. v. Van Orden*, 64 *How. Pr.* 79.) Notice of the lien is not necessary to its efficacy, (*Keeler v. Keeler*, 51 *Hun.* 505; *Guliano v. Whitenback*, *supra.*; *Washburn v. Mott*, *supra.*\*)

The motion is granted with costs, but finding in the papers no proof of the amount of the attorney's compensation, it must be ascertained upon a reference. (1 *Bliss' Code*, p. 77.)

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 ESTATE OF WILSON G. HUNT.

SURROGATE'S COURT, NEW YORK COUNTY,  
FEBRUARY, 1895.

§ 2746, 2838, 2840.

*Ancillary guardian—no additional bond.*

Where ancillary letters are granted to the duly appointed general guardian of an infant, who has given the security described in subdivision one of section 2838 of the Code of Civil Procedure,

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\* Also *Lewis v. Day*, 10 *Weekly Dig.* 49. Assignment of the judgment does not deprive the attorney of his lien. The assignees are put on inquiry by the fact that the attorney's name appears upon

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Estate of Wilson G. Hunt.

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such ancillary guardian is authorized to demand and receive the personal property of his ward and remove it from the State, without giving any additional bond therefor.

Under section 2840 of the Code of Civil Procedure, ancillary letters, if granted, shall be issued without security, and the receipt of the ancillary guardian shall be a full protection to the executors in paying over to him the legacies in question.

(Decided February, 1895.)

Application by ancillary guardian of infants for an order requiring the executors of an estate to pay over to him certain legacies due to said infants.

Facts, so far as material, are stated in the opinion.

*Parsons, Shepard, & Ogden*, attorneys for ancillary guardian.

ARNOLD, S.—Applications are made by the guardian of certain infants to whom ancillary letters have been granted by this Court for the payment to it of legacies given by the will of Wilson G. Hunt to said wards. There is no opposition made further than that the executors claim that it is doubtful whether they can safely make such payments until or unless the ancillary guardian gives a bond similar to that required under like circumstances from a domestic guardian under section 2746 of the Code. The ancillary letters were granted upon proof, among other things, that the applicant for same was the duly appointed general guardian of the minors, and had given the security described in subdivision 1 of section 2838.

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the judgment and its docket, and no actual notice of the lien to them is necessary. *Marvin v. Mavin*, 46 St. Rep. 259; S. C., 22 Civ. Pro. R. 274.

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Estate of William Gee.

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It is to be assumed that such security was directed and given for the whole of the infants' estates, including the legacies in question. While under the like conditions a domestic guardian would have to give an additional bond, it does not follow that the ancillary guardian must do so, and unless there is some express or implied requirement of law calling therefor, it should not be required of it. I do not find any such requirement, but on the contrary section 2840, Code, expressly provides that ancillary letters, if granted, shall be issued without security and the ancillary guardian shall thereupon be authorized to demand and receive the personal property of the ward and may remove same from the State. The receipt of the ancillary guardian in this case will be a full protection to the executors in paying over to it the legacies here in question.

Application granted : submit order.\*

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ESTATE OF WILLIAM GEE.

SURROGATE'S COURT, NEW YORK COUNTY,

FEBRUARY, 1895.

§§ 2539, 2540.

*Examination of sick or infirm witness, without the county, by referee.*

Under sections 2539, 2540, of the Code of Civil Procedure, the Surrogate may order the deposition of a sick or infirm witness in another county to be taken before a referee, provided that such witness be not "a subscribing witness to the will."

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\*Decree subsequently amended on motion before Fitzgerald, S., to provide for the payment of the transfer tax on legacies. See *N. Y. Law Journal* of Feb. 13, 1895.

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Estate of William Gee.

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Though ordinarily the transmission of the will to the referee for use on the examination will not be allowed; still where the conflicting interests in the estate are fairly represented, the executor disinterested, and all parties, including the special guardian unanimous for the granting of the application, the order will not be refused.

*In re McCoskey* (10 Civ. Pro. R. 178) approved and followed.  
(Decided February, 1895.)

Application by proponent of a will for an order directing the examination of a sick and infirm witness without the county, to be taken before a referee.

*Edward S. Clinch*, attorney for the proponent.

ARNOLD, S.—This is an application on the part of proponent for an order directing the examination of a witness residing in Greene County, in this State, to be taken before a referee in such county. I entertain no doubt of the power of the surrogate to make such order. Section 2539 of the Code prescribes the practice where a witness who is aged, sick or infirm cannot attend before the surrogate in whose county the proceeding is pending. Section 2540 provides for cases where the disabled witness is in another county, and this not being an application for "the examination of a subscribing witness to a will" comes within the category of "other cases" in which a referee may be appointed. The decision *in re McCoskey* (10 Civ. Pro. R. 178), is not only not in conflict with this view of the subject but entirely in harmony with it. The affidavit presented is not very explicit as to the materiality of the evidence expected to be elicited from the witness, but having supplemented it by an examination of the testimony of the subscribing witnesses, who fail to prove the execution of the will, there is enough to satisfy me that the testimony now

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Burrell v. Do Sim.

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- sought may be material. The provision with respect to the transmission of the will to the referee for use on the examination should not ordinarily be granted, but as the conflicting interests in this estate seem to be fairly represented, assuming the executor to be, so far as the papers and proceedings indicate, entirely disinterested, and all the attorneys as well as the special guardian not only consent to but urge the granting of the application, that provision may remain with a slight amendment.

Order as amended signed.

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BURRELL v. DO SIM, *et al.*

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,  
JANUARY, 1895.

## § 2244.

*Counterclaim—in summary proceedings.*

The provisions of section 2244 of the Code of Civil Procedure, permitting the interposition of a counterclaim in summary proceedings, "in like manner as though the claim for rent in such proceeding was the subject of an action," do not extend to a claim by the tenant for damages sustained by reason of a conversion of chattels by his landlord.

(Decided January 7, 1895.)

Appeal by defendants Do Sim, Yuen Yun, and Jim Kam, from a judgment of the Second District Court in summary proceedings, in favor of plaintiff.

*George W. Glaze*, for defendants and appellants.

*George W. Stevens*, for plaintiff and respondent.

BISCHOFF, J.—In a summary proceeding for the possession of leased premises the tenants (defendants)

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set up a counterclaim for damages sustained by reason of the plaintiff's having unlawfully retained and withheld certain furniture and food stuffs belonging to the defendants, and found upon the demised premises; the latter property being claimed to have been rendered valueless by reason of its perishable character. This counterclaim was dismissed at the trial upon the plaintiff's motion, and, although the appellants' counsel took no exception to the ruling, it is urged that error is in some manner presented. Waiving the point that an exception should have been taken, the ruling is found to be clearly right. Section 2244 of the Code of Civil Procedure (Amended Laws 1893, c. 705) permits the interposition of a counterclaim in summary proceedings, but it is thereby provided that "such counterclaims may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action."\* It is not to be gathered from this section that a counterclaim of every conceivable variety may be set up in these proceedings, in view of the latter provision, which clearly appears to be explanatory of its scope. The counterclaim here interposed was set forth strictly as a claim for damages by reason of a conversion of the chattels, and, viewing the proceeding as an action of which the claim for rent was the subject, such counterclaim was properly dismissed. *M'Kensie v. Farrell*, 4 *Bosw.* 192-202; *Drake v. Cockroft*, 4 *E. D. Smith*, 34; *Romaine v. Brewster* (*Com. Pl. N. Y.*) 30 *N. Y. Supp.* 948; *Finkelmeier v.*

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\* Before the amendment of 1893, the answer was limited to denials: there was no authority for affirmative allegations. *Becker v. Church*, 5 *St. Rep.* 97, *S. C.* 42 *Hun*, 258.

Nor could a counterclaim be pleaded. *Barnum v. Fitzpatrick*, 46 *St. Rep.* 891; *Durant L. Imp. Co. v. East Riv. El. Co.*, 23 *Civ. Pro. R.* 29.

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American Distributing Co. v. Distilling and Cattle Feeding Co.

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Bates, 48 *N. Y. Super. Ct.* 433, 441; Mayor, etc., v. Parker Vein Steamship Co., 12 *Abb. Pr.* 300, 303.

It is further claimed that a judgment of dispossession for the plaintiff was improperly rendered upon the defendants' refusal to proceed, the appellants' contention being that possession by them of the premises had not been shown.

In answer it suffices to say that the verified petition filed by the landlord alleged the fact of possession by the tenants as required by the statute (Code, sections 2231, 2235); and by reason of the defendants' withdrawal from the proceedings, and their refusal to proceed upon the trial of what issues might be raised by the answer, this allegation stood as sufficient to support the judgment. Moreover, it was admitted at the trial that the effects of the tenants were still upon the premises at that time.

The final order is affirmed, with costs.

BOOKSTAYER, J., concurred.

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AMERICAN DISTRIBUTING COMPANY v. DISTILLING AND CATTLE FEEDING COMPANY.

SUPREME COURT, SPECIAL TERM CHAMBERS,  
NEW YORK COUNTY,

FEBRUARY, 1895.

§ 650.

*Attachment—certificate of defendant's interest.*

A person required to give a certificate under section 650 of the Code of Civil Procedure, can not put an end to the examination by denying the defendant's title to the goods, or by simply saying that he is not indebted to the defendant, against whom the attachment is issued.

(Decided February 18, 1895.)

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American Distributing Co. v. Distilling and Cattle Feeding Co.

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Motion to vacate an order directing Lawrence H. Quinn to appear and be examined.

*Holcomb, Martin & Weil*, for the motion.

*Vanderpoel, Cuming & Goodwin*, opposed.

LAWRENCE, J.—In this case I am of the opinion that the motion to vacate the order directing Lawrence H. Quinn to appear and be examined, under section 650 of the Code of Civil Procedure, should be denied, with costs, on the ground that the certificate given by him to the sheriff is not sufficient to exempt him from such examination. It has frequently been held that a person required to give a certificate under the above section of the Code, could not put an end to the examination by denying the defendant's title to the goods, or by simply saying that he was not indebted to the defendant, against whom the attachment was issued (see *Rutter v. Boyd*, 3 *Abb. N. C.* 6 ; *Glen Cove Starch Manufacturing Co. v. Gotthold*, 1 *Civ. Pro.* 367 ; *Baxter v. Missouri, Kansas & Texas Railway Co.* 4 *Hun*, 630 ; *Seligman v. Falk*, 13 *Civ. Pro.* 77). The last two cases were decided by the General Term of this Department, and, so far as I am aware, have never been reversed.

Order signed.



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Thompson Co. v. Lobenthal.

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EDWARD THOMPSON COMPANY v. SAMUEL  
LOBENTHAL.

NEW YORK CITY COURT, SPECIAL TERM,  
FEBRUARY, 1895.

§ 3268.

*Security for costs—domestic corporation.*

The security for costs provided for in section 3268 of the Code of Civil Procedure, to be given by the plaintiff in an action brought by a person residing without the county, or by a foreign corporation; does not extend to a domestic corporation created under the laws of this State,

(Decided February 15, 1895.)

Motion by defendant to require plaintiff to give security for costs.

*William O. Campbell*, for the plaintiff.

*Samuel Lobenthal*, for defendant in person.

ERLICH, C. J.—Section 3268 of the Code, in regard to security for costs, applies to persons residing without the county or to foreign corporations. The plaintiff herein is a domestic corporation, created by the Laws of this State, and does not come within the category of those who are required to furnish security.\*

Motion denied, with \$10 costs to abide the event.

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\* The rule would be different in the case of a corporation organized under the laws of another State, notwithstanding it had a place of business within this State. *F. A. Kennedy Co. v. McCormack*, 15 Civ. Pro. R. 239.

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Kaliske v. Weil.

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KALISKE v. WEIL, *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
FEBRUARY, 1895.

§§ 452, 821.

*Dismissal of complaint—non-service of summons on a defendant—  
when not granted.*

Dismissal of the complaint for non-service of summons on a defendant, is warranted only "when a complete determination of the controversy cannot be had" without the presence of such defendant.

To the objection that it is injustice to bind a party in his absence, the answer is twofold: First, that the defendant not served, might nevertheless have voluntarily appeared in protection of his rights; and, secondly, that the court on the trial will, if necessary, direct the absent defendant to be brought in. (*Decided February, 1895.*)

Motion to dismiss complaint for non-service of summons on a defendant.

*Edwin T. Taliaferro*, for the plaintiff.

*Holcomb & Martin*, for the defendants.

PRYOR, J.—Action against partners for specific performance of an agreement for a release, and motion to dismiss the complaint for non-service of summons on a defendant. The order solicited is not authorized by section 821, Code of Civil Procedure. Dismissal of the complaint for non-service of summons on a defendant, is warranted only "when a complete determination of the controversy cannot be had" without the presence of such defendant. But counsel for the motion concedes that a release by the

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Foley, Jr., v. Mercantile National Bank.

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defendants served will bind the other. What then is wanting to a complete determination of the controversy? Manifestly nothing. Counsel objects against the injustice of binding a party in his absence, to which the twofold answer is: First, that the defendant not served, might nevertheless have voluntarily appeared in protection of his rights (*Wobble v. Vanderheyden*, 8 *Paige*, 45; *Georgia, etc., v. Bissel*, 9 *Paige*, 235; *Skinner v. Noyes*, 7 *Robt.* 228); and, secondly, that the court on the trial will, if necessary, direct the absent defendant to be brought in (*Code of Civ. Pro.* § 452; *Powell v. Finch*, 5 *Duer*, 666).

Motion denied, with costs.

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JOHN R. FOLEY, JR., AS ADMINISTRATOR, ETC., v.  
MERCANTILE NATIONAL BANK, *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
FEBRUARY, 1895.

§§ 500, 501, 507.

*Counterclaim must be separately stated and numbered.*

Where the defendant in an action sets up in his answer, details of the transactions which are the subject of the plaintiff's complaint, denying the charges thereof, and demanding an accounting; and where the account set up in the answer seems to show a balance due to the defendant, such account "must be separately stated and numbered," as a counterclaim, in order that the plaintiff may take issue with it by a reply.

A counterclaim is a cause of action in favor of the defendant against the plaintiff, whether independent of the plaintiff's claim, or connected with it; and denials form no part thereof.

(Decided February 19, 1895.)

Motion by plaintiff to compel defendants to sep-

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arately state and number the defenses and counterclaims contained in their respective answers.

The facts are stated in the opinion.

*Henry Schmidt*, for the motion.

*Charles A. Davison, Wm. G. Lathrop, Jr.*, opposed.

DALY, C. J.—The plaintiff moves to compel the defendants, the bank and St. John, to separately state and number the defenses and counterclaims contained in their respective answers to the complaint. The complaint sets up general transactions between the plaintiff's intestate, John R. Foley, and the defendant Alexander Lutz on the one part, and the defendant bank and its president, William P. St. John, on the other part, by which loans of money were made to Foley and Lutz by the bank upon certain securities, consisting of real estate and other property, and asks an accounting of such transactions, alleging incidentally breaches of duty on the part of defendants with regard to the management and disposition of the securities, usury in some of the loans, and claiming that upon the accounting a large sum will be found due to the plaintiff. The bank and its president, "for separate answers to the amended complaint and by way of counterclaim," set up, each in a pleading of over a hundred folios, details of the transactions which are the subject of the plaintiff's complaint, deny all the charges of breach of duty and of usury, and also demand an accounting. There does not appear to be any counterclaim of specific indebtedness due from the plaintiff to the defendants, but the account as set up in the answer seems to show a balance due to the bank. All the transactions of the president individ-

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Patterson v. Knapp.

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ually were on behalf of his bank. The Code requires that "each defense or counterclaim must be separately stated and numbered" (section 507); and where a defendant describes his pleading as a counterclaim he is bound to state it separately from his other defenses. Denials are no part of a counterclaim (section 500). A counterclaim is a cause of action in favor of the defendant against the plaintiff whether independent of the plaintiff's claim or connected with it (section 501). A separate statement of a counterclaim is indispensable in order that plaintiff may take issue with it by a reply.

Motion granted, with \$10 costs to abide the event of the action.

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PATTERSON v. KNAPP.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,  
JANUARY, 1895.

## § 1019.

*Right to terminate reference—no report filed within 60 days—right not lost by agreement to extend the statutory time.*

Under section 1019 of the Code of Civil Procedure, either party to a reference, where the referee neglects to file or deliver his report within sixty days from the time when the cause or matter is finally submitted to him, may elect to end the reference; and such statutory right is not lost by an agreement extending the time for a definite period, where the referee fails to file his report before the end of that period.

(Decided January 18, 1895.)

Appeal by plaintiff from an order setting aside the report of the referee, and vacating a judgment entered thereon.

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*Patterson v. Knapp.*

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On the 4th of January, 1890, by an order duly made and entered, the issues in this action were referred to a referee to hear and determine. January 30, 1892, the trial was begun, and was continued from time to time until October 12, 1893, when the case was finally submitted to the referee for decision. On November 15, 1893, the attorneys for the parties, by a written stipulation, extended the time in which the decision might be made for sixty days from December 1, 1893; and thereafter, by a like stipulation, the referee's time was extended for sixty days from January 30, 1894; and on March 28, 1894, by a like stipulation, his time was again extended for thirty days from that date, which extended time expired April 27, 1894, since when no extension of time, oral or written, has been given. On the 18th of September, 1894, defendant's attorneys served a written notice on the plaintiff's attorney and on the referee, terminating the reference, pursuant to section 1019 of the Code of Civil Procedure.\* On October 8, 1894, the referee made his report, which was served on the defendant's attorney on the next day; and November 16, 1894, judgment thereon was entered in favor of the plaintiff for \$5,354.66 damages and costs.

Argued before VAN BRUNT, P. J., and O'BRIEN, and FOLLETT, J. J.

*E. H. Benn*, for plaintiff, appellant.

*N. B. Sanborn*, for defendant, respondent.

*Per Curiam.* Section 1019 of the Code of Civil Procedure provides:

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\* What is a sufficient notice? *Held*, that notice of trial at the circuit was a notification of an intention to disregard the reference. *Livingston v. Gidney*, 25 *How. P. R.* 1.

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Patterson v. Knapp.

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“Upon the trial by a referee of an issue of fact or an issue of law, or where a reference is made as prescribed in section one thousand and fifteen of this act, the referee's written report must be either filed with the clerk, or delivered to the attorney for one of the parties, within sixty days from the time when the cause or matter is finally submitted ; otherwise, either party may, before it is filed or delivered, serve a notice upon the attorney for the adverse party that he elects to end the reference.\* In such a case the action must thenceforth proceed as if the reference had not been directed ; and the referee is not entitled to any fees.”†

It is urged in behalf of the appellant that the time given the referee, by statute, in which to make his report, having been extended, the parties lost their right to terminate the reference by notice ; and *Thiesselin v. Rossett*, 3 *Abb. Pr. (N. S.)* 54, is cited in support of the proposition. It was so held at special term, but the general term, in considering the case, sought other grounds for its affirmance of the order ; and, in so far as the case holds that an extension of time to a referee suspends forever the operation of the section, it is overruled. The object of the section was to facilitate the early decision of references, and to put it within the power of litigants to compel referees promptly to

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\* Report should be delivered to the successful party. *Richards v. Allen*, 11 *N. Y. Leg. Obs.* 159.

† Referee not bound to give up his report until his fees are paid. *Gibb v. Topping*, 83 *N. Y.* 46.

Where a referee failed to deliver his report within sixty days, but swore that both parties had consented that he might take his time to report—*Held*, that he was entitled to his fees. *Foster v. Bryan*, 16 *Abb.* 396.

The time may be extended by order of the court or a judge. *Thiesselin v. Rossett*, 3 *Abb. N. S.* 54.

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*Patterson v. Knapp.*

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decide cases submitted to them ; and an extension of the referee's time for a definite period does not operate to extend the time indefinitely, or put it beyond the power of either party to terminate the reference in case the referee fails to decide within the time stipulated. The rule contended for would be wholly inconsistent with the terms of the written agreement entered into between the attorneys, and violative of the purposes of the section.

The attorney for the plaintiff and the referee asserts that, when the case was submitted, it was agreed between the attorneys that the referee might have all the time he desired in which to decide the case.\* No memorandum of any such agreement was entered in the minutes of the referee, and the attorney for the defendant, and his clerks, deny that such an agreement was made. The object of rule 11 of the supreme court is to relieve courts from deciding the disputes arising between attorneys as to whether or not a particular agreement was entered into in respect to the conduct of the case, and we shall not undertake to decide in this case whether or not an oral agreement was entered into between the attorneys.

The order is affirmed, with \$10 costs and disbursements.

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\* Where, upon final submission of the case to the referee, there is an oral agreement in open court, extending indefinitely the time within which his report shall be made, the reference cannot be terminated at the election of a party after the expiration of sixty days. The remedy in such case, it seems, is to serve notice upon the adverse party and referee, that unless the report is made within a specified reasonable time, the reference will be deemed ended. *Ballou v. Parsons*, 55 N. Y. 673, aff'g 52 How. P. R. 164.



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Hawk, etc., v. The American News Co.

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HAWK, ETC., v. THE AMERICAN NEWS COMPANY.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
FEBRUARY, 1895.

§§ 508, 535, 536, 3343.

*Libel—facts stated in mitigation of damages.*

In an action for libel, a defense stating facts tending to disprove actual malice, thereby resisting the recovery of exemplary damages, is not demurrable.

(Decided February, 1895.)

Action to recover damages for an alleged libel published in the "World." Defendant's answer stating matter in mitigation of damages is demurred to by plaintiff.

*E. W. Brenen*, attorney for plaintiff.

*E. A. Carley*, attorney for defendant.

BISCHOFF, JR., J.—The partial defense to which the demurrer is interposed is properly pleaded as such (*Code of Civil Pro.* § 508), being a statement of matter in mitigation of damages (*Code of Civil Pro.* §§ 536, 3343, sub. 9, § 535), since in an action for libel facts tending to disprove actual malice, such as do those here pleaded, may be proven in mitigation, inasmuch as a recovery of exemplary damages may be thereby resisted (*Prisbey v. Shaw*, 12 N. Y. 67, 74; *Bush v. Prower*, 11 *Id.* 347; *Samuels v. Ev. Mail Ass'n*, 52 *Id.* 625, 1 *Abb. N. C.* 152, note).

Demurrer overruled, with costs.

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Estate of Ann Owens.

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## ESTATE OF ANN OWENS.

SURROGATE'S COURT, NEW YORK COUNTY,  
FEBRUARY, 1895.

§ 2643.

*Letters testamentary—unincorporated association not entitled to—  
power of surrogate to construe wills.*

Where a devise is made to "the Sisters of Charity, attached to St. Lawrence Catholic Church," an unincorporated body, such Sisters of Charity, either as a body, or individually, are not entitled to letters of administration on the estate of the deceased, in preference to the next of kin.

For the purpose of passing upon applications of various kinds which he is empowered by statute to entertain and decide, the surrogate has authority to construe the terms and provisions of testamentary instruments.

(Decided February 21, 1895.)

Application by next of kin for letters testamentary with the will annexed. Opposition to the application is made by one claiming a prior right as legatee under the will.

The facts are stated in the opinion.

*Henry Cooper*, for petitioner.

ARNOLD, S.—This is an application by one Mary Lavelle for letters testamentary with the will annexed, both the executors named in the will having died. It stated that there is some personalty to a small amount yet unadministered upon. Petitioner is a niece of the testatrix, and the only one of her next of kin residing in this State. Section 2643 of the Code gives the preference upon similar applications to legatees under

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Estate of Ann Owens.

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the will, then to the next of kin. No application on the part of any legatee has been made, but the citation herein has issued to and been served on all the surviving legatees or they have appeared in this proceeding. The only opposition to the application is made by a person claiming to be one of "the Sisters of Charity attached to St. Lawrence Catholic Church," who asserts a prior right to such letters. By the terms of the will the testatrix devises her whole estate after the decease of her only child, who died as it happened a few days before the date of the testatrix's own demise, in equal parts, one to St. Lawrence Catholic Church aforesaid, one to the Sisters of Charity attached to said church, and the third to the Little Sisters of the Poor. It is conceded that the Sisters of Charity attached to St. Lawrence Catholic Church are not incorporated, and it is contended that the devise must be construed as applying to the persons answering the description given as individuals, but on the other hand it is insisted that the devise is to an unincorporated association which has not power by law to take it. I am of the opinion that the latter is the correct position, and that it was manifestly not intended by the testatrix to give a large portion of her estate to such individuals as at her decease—an indefinite and unfixed period—should happen to be Sisters of Charity and attached to St. Lawrence Church, or should answer that description at the date of the will, but that the devise was to the Sisters of Charity attached to the church as a body and for charitable and not personal purposes. It has been very frequently held that for the purpose of passing upon applications of various kinds which he is empowered by statute to entertain and decide, the Surrogate has authority to construe the terms and provisions of testamentary instruments (*Susz v. Forst*,

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Estate of Ann Owens.

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4 *Dem.* 348 ; Matter of Gillingham, 46 *Hun.* 64 ; Matter of Fernbacher, 4 *Dem.* 227 ; Matter of Wood, 15 *N. Y. State Rep.* 722, affirmed 27 *N. Y. State Rep.* 587, and 119 *N. Y.* 660). I should not deem the fact that the individuals answering the description in question were ordered to be made parties defendant as such, in an action for partition of the decedent's real estate, should govern this Court upon the present application, as they might have been brought in simply for greater caution, and to obtain a judgment on the very point in controversy which would be conclusive on them. And it appears that in another action for partition in the Supreme Court an application to make the individual "Sisters" in question parties to a suit involving real estate, in which their only possible interest was derived under the same will, was denied. In this matter it is necessary that the application of the petitioner should be granted or denied, and the disposition of the matter calls for a construction of the will as to who was intended by the testatrix by the terms used by her as her legatees. I do not think that any one or more of the persons who may answer individually to the description of a Sister or Sisters of Charity attached to St. Lawrence Catholic Church is entitled to letters of administration herein, and as the relationship of the applicant to the decedent as claimed by the former is conceded, she is entitled to the letters asked for.

Decree for letters to the petitioner as prayed for is ordered.

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Tweedy v. United Life Insurance Association.

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TWEEDY v. UNITED LIFE INSURANCE  
ASSOCIATION.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
FEBRUARY, 1895.

§ 724.

*Mistake in filing note of issue—how remedied.*

The court has power to relieve a plaintiff from the consequences of his mistake in filing a note of issue in the wrong office, by ordering it to be filed *nunc pro tunc* in the office of the clerk of the proper court, and thus supply his omission to place the cause upon the calendar for the same term for which it had been noticed for trial.

An order so obtained, though irregular because applied for without notice to the defendant, is valid until set aside.

(Decided February 27, 1895.)

Motion by defendant to strike the cause off the calendar, for irregularity in the filing of the note of issue.

*DeLancey Nicoll* (of counsel), for plaintiff.

*Harry Wilber*, for defendant.

DALY, C. J.—The court had power to relieve the plaintiff from the consequences of his mistake in filing the note of issue for November, 1893, in the wrong office, by ordering it to be filed *nunc pro tunc* in the office of the clerk of this court, and thus supply his omission to place the cause upon the calendar for same term for which it had been noticed for trial (Code, § 724). But the order which the plaintiff obtained for that purpose was irregular because applied for without notice to the defendant. It is valid, however, until

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*Lazarus v. Metropolitan Elevated Railway Co.*

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set aside, and as its effect was to place this cause upon the general calendar the same as if a note of issue had been filed in due time, the motion now made by defendant to strike the cause from the calendar cannot be granted. As the plaintiff, however, has waived the benefit of his former order by now making a new motion upon notice for the same relief, viz., that the same note of issue be filed *nunc pro tunc* as of October 25, 1893, for the November term, 1893, the matter comes up for disposition upon the merits, and I will grant the application upon condition that the trial be stayed until the defendant have an opportunity to move for the commission which he desires and for a stay of proceedings. The case may retain its present number and will be marked off term.

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LAZARUS, *et al.*, v. METROPOLITAN ELEVATED  
RAILWAY COMPANY, *et al.*

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,  
JANUARY, 1895.

§§ 1022, 1023.

*Pending actions—repeal of a rule of procedure affects.*

Laws of 1894, c. 688, repealing section 1023 of the Code of Civil Procedure, which authorized either party to an action to request the court or referee to determine all of the issue of fact and law deemed to have been involved in the action, and amending section 1022 of the Code of Civil Procedure, to provide simply for the concise statement of facts and conclusions of law in his decision, applies to an action submitted to a referee before the passage of such law, but decided afterwards. Rules of procedure may be changed so as to affect pending actions.

(Decided January 18, 1895.)

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*Lazarus v. Metropolitan Elevated Railway Co.*

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Appeal by defendants from an order of special term.

Action by Sarah Lazarus and others, individually, Agnes Marks and another, as administrators, etc., against the Metropolitan Elevated Railway Company and others, for an injunction and damages. From an order denying a motion for an order sending back the report of the referee and directing him to rule on defendants' proposed findings of fact and conclusions of law, and to resettle said report, or for an order vacating and setting aside said report and all the proceedings had thereon, defendants appeal. Affirmed.

*J. C. Thomson*, for defendants, appellants.

*Nelson S. Spencer*, for plaintiffs, respondents.

*Per Curiam.* May 27, 1893, this action was referred to a referee to hear and determine; and on March 22, 1894, it was finally submitted to him for decision, and, by written stipulations between the attorneys, his time to decide the cause was extended until October 27, 1894. On May 12, 1894, chapter 688 of the laws of that year was enacted, to take effect June 1, 1894, repealing section 1023 of the Code of Civil Procedure, which authorized either party to a litigation to request the court or referee to determine all of the issues of fact and law deemed to have been involved in the action. Section 1023 was repealed after this action was submitted to the referee, but the repeal took effect before he made his decision. The attorneys for the defendants, believing that fifty-eight issues of fact and twenty-two issues of law were involved in the action, on the 22d of March, 1893, requested the referee to pass on that number of issues of fact and law. Upon the

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*Lazarus v. Metropolitan Elevated Railway Co.*

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decision of the case, the referee did not note on the margin of the various propositions of fact and law how he had disposed of them, but instead, stated concisely the facts found and his conclusions of law, in the form prescribed by section 1022 of the Code of Civil Procedure, as amended by the third section of chapter 688 of the Laws of 1894.\* At the date of the decision of this case, there was no statute which required the referee to determine the various propositions of law and fact requested by either litigant, and there is no provision in the statute excepting from its operation cases pending at the time of its passage. Section 1023 did not relate to the substantive law of the State, but prescribed a rule of procedure ; and it is too well settled to require the citation of authority that the practice of the court may be changed so as to affect pending actions. The referee, so far as the procedure was concerned, had the right to adopt the form of decision authorized at the time he rendered his decision. In case a statute taking effect after a cause had been submitted to a referee should require the report to be made in a particular form, or that it should be filed within a given time, we have no doubt that it would control the practice of a case so situated. By the Code of 1848, and again by the Code of Civil Procedure, the practice of the courts was radically changed, and the new practice has been held applicable to pending cases, and that a step in procedure is to be taken according to the rule in existence when the prescribed step is taken. We think that neither party had the right to require the referee to pass upon the requests pursuant to the repealed section of the Code.

The order should be affirmed, with \$10 costs and disbursements.

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\* The amendment of 1894 did away with the absolute requirement of findings.



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Graham v. Andrews.

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GRAHAM v. ANDREWS, *et al.*

NEW YORK SUPERIOR COURT, SPECIAL TERM,  
MARCH, 1895.

§§ 1512, 1513, 1514.

*Authority of plaintiff's attorney to sue—proved by verification of complaint.*

In an action of ejectment, where the defendants move to require the attorney of the plaintiff to produce evidence of his authority to commence the action, pursuant to sections 1512, 1513, of the Code of Civil Procedure; *Held*, that the complaint, verified by the plaintiff, is in legal effect a written request by the attorney to commence the action, and a written recognition of his authority so to do, sufficient to satisfy every requirement of the Code provisions.

(Decided March 11, 1895.)

Motion by the defendants to require the attorney of the plaintiff to produce evidence of his authority to commence the action.

*Truman H. Baldwin*, for plaintiff.

*John Andrews*, for defendants.

MCADAM, J.—The action is in ejectment, and the defendants move to require the attorney of the plaintiff to produce evidence of his authority to commence the action (Code, §§ 1512, 1513). The Code provisions are taken from the Revised Statutes (6th ed., vol. 3, p. 573), section 15 of which declares that “any written recognition of the authority of the attorney” shall be deemed presumptive evidence of such authority. Under this statute a writing signed by one of two

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Estate of Joseph Basch.

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plaintiffs on behalf of both, requesting the attorney to continue the action, was a sufficient recognition of his authority to commence it (*Howard v. Howard*, 11 *How. Pr.* 80). The Code (§ 1514) provides that "any written request of the plaintiff or his agent to the plaintiff's attorney to commence the action or any written recognition of his authority so to do, verified by the affidavit of the attorney or any other competent witness, is sufficient presumptive evidence of such authority." In answer to the defendant's application, the plaintiff's attorney swears "that the original complaint herein, verified by the plaintiff personally, was filed with the clerk of this court on the 31st day of January, 1895, and that a copy of said complaint and verification was served on the defendants personally." The complaint, so verified, is in legal effect a written request by the attorney to commence the action, and a written recognition of his authority so to do, sufficient to satisfy every requirement of the Code provisions. This is not a proper case for requiring further evidence of authority (Code, § 1513; *Carpenter v. Allen*, 45 *N. Y. Sup. Ct. R.* 322).

Motion denied, with \$10 costs to abide the event.

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ESTATE OF JOSEPH BASCH.

NEW YORK SURROGATE'S COURT, MARCH, 1895.

§§ 2707, 2709.

*Examination of third party by Public Administrator touching property alleged to belong to decedent—claim of title in third party dismisses the proceeding.*

Where the Public Administrator has cited a person to appear and be examined touching certain personal property in her possession,

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alleged to be the property of the decedent, and where on the return day, the person cited interposes a written answer duly verified, that she is the owner of the property or entitled to its possession by virtue of a lien thereon or special property therein, the Surrogate must dismiss the proceeding as to such property so claimed.

When claim of title is interposed, the surrogate is ousted of jurisdiction, and cannot decide the question raised, the parties being remitted to another tribunal, where a jury trial or other proper and constitutional disposition of the issues may be had.

Under such circumstances, no examination is permissible, and if it were allowed, no order could be made for the delivery or disposition of the property, based upon it.

(Decided March 11, 1895.)

Application by the Public Administrator for an examination of the respondent in regard to property in her possession, alleged to belong to the decedent.

The facts are stated in the opinion.

*Jacob Fromme*, for respondent.

ARNOLD, S.—This is an application by the Public Administrator for an examination of the respondent touching certain personal property in her possession which he alleges upon information and belief belonged to the decedent. A citation and order having been granted and served upon her, the respondent appears and files a verified answer claiming to be “the owner of each and every item and article of property in said petition enumerated,” and thereupon asks by virtue of the provisions of section 2709 of the Code for a dismissal of the proceedings. The Public Administrator conceding that the issues made by the petition and answer cannot be tried in this Court, and that no order for the delivery of the property in question can be made, nevertheless claims the right to proceed with

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the examination of the party for the purpose of procuring the disclosure of any knowledge or information concerning the property which she may have. The proceedings for discovery by the Public Administrator are regulated where he is acting under letters of administration granted to him by the Surrogate, by the provisions of the Code (Matter of Elias, 4 *Dem.* 139). The purpose of these provisions is to enable the legal representative of an estate to obtain possession of property belonging to it which is withheld from him. Two classes of persons may be cited, those who have possession or control of the property in question and who can therefore deliver it if required so to do, and those who only have knowledge or information concerning it (section 2707 of the Code). If on the return day the person cited interposes a written answer duly verified that he is the owner of the property or entitled to its possession by virtue of a lien thereon or special property therein the Surrogate must dismiss the proceedings as to such property so claimed.\* If no such claim is made as so provided the examination must proceed. The result is that where claim of title is interposed the Surrogate is ousted of jurisdiction and cannot decide the question raised, the parties being remitted to another tribunal, wherein a jury trial or other proper and constitutional disposition of the issues may be had. If no claim is made to the title or possession of the property a full inquiry is allowed for the purpose of ascertaining what knowledge or infor-

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\* An answer that the person cited "is the owner of the property" in question, is sufficient without showing how he became such; but where he claims to be "entitled to the possession thereof, by virtue of a lien thereon, or special property therein," he must allege the facts necessary to sustain the claim. *Metropolitan Trust Co. v. Rogers*, 1 *Dem.* 365.

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mation the person cited has as to the property. In this case the party comes before the Court and files a written and verified answer claiming absolute ownership of all the property in question. Under such circumstances no examination is permissible, and if it were allowed no order could be made for the delivery or disposition of the property based upon it.\* The provisions of the statute are peremptory to whichever of the two classes mentioned the party cited may upon the face of the petition belong. It is true that section 2709 provides that the proceedings shall be dismissed as to the property claimed, but that is meant to cover a continuance as to such property mentioned in the petition as is not claimed by the answer. If there be any such, and the answer admits possession or control, as well as ownership by the estate, suitable provision may be made for its delivery to the legal representative ; if full concession in these respects is not made, then the party must submit to full examination as to what he knows or has been informed as to such part of the property described in the petition to which he asserts neither title or lien nor special interest.† Here the ownership of all the property is claimed in hostility to the Public Administrator, as legal representative of the intestate.

The proceedings are dismissed.

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\* The question of possession only, and not that of title, can be examined, and §§ 2706 to 2714 are not in conflict with the provisions of the constitution. *Estate of Seaman*, 16 *Weekly Dig.* 118.

† If the answer claims title to only a portion of the property, it does not bar inquiry. *Estate of Elias*, 2 *How. N. S.* 158.

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Weiss v. Ashman.

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LOUIS WEISS, RESPONDENT, *v.* EDWIN F. ASHMAN, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,  
FEBRUARY, 1895.

§ 2435.

*Supplementary proceedings—doctrine of res adjudicata not applicable—under what circumstances second examination granted.*

Where a judgment debtor has been examined in supplementary proceedings, and has signed but not verified his examination, an order of the court denying a motion to compel defendant to verify the testimony given and signed by him, is not *res adjudicata* and an order for a second examination will be granted.

Where, however, under an order, the debtor has been fully examined, no subsequent examination should be allowed unless the moving affidavits show that he has subsequently acquired property, or an alias execution has been issued and returned *nulla bona*, or that new facts have come to the knowledge of the applicant.

Section 2435 of the Code of Civil Procedure does not restrict a party to a single examination of his judgment debtor, but at the most, prescribes that but one order can be instituted at a time.

(Decided February, 1895.)

Appeal from an order denying a motion to vacate a previous order requiring defendant to appear and be examined in supplementary proceedings.

The facts are stated in the opinion.

*Gilbert R. Hawes*, for plaintiff and respondent.

*W. T. Birdsall*, for defendant and appellant.

BOOKSTAVEN, J.—In October, 1893, the plaintiff instituted supplementary proceedings against the defendant, who was from time to time examined under

said order, and the proceedings were adjourned until December 5th of the same year, when they were dismissed by reason of plaintiff's default. Notwithstanding this dismissal, the defendant, at plaintiff's request attended in court on the 19th of January, 1894, and signed the examination, but did not verify it, the Court being engaged at the time, whereupon the defendant claims the plaintiff abandoned the proceedings. Thereafter plaintiff obtained an order to show cause why the defendant should not verify the testimony given and signed by him, and for other relief.

Afterwards, on a presentation of all the facts, this motion was denied, and thereafter and on the same day, the judge who denied the order, granted a new order for the examination of the defendant in supplementary proceedings. The affidavit upon which it was granted stated with more or less accuracy the previous proceedings in the matter. When this order was served upon him, the defendant made a motion to vacate it, which was denied, and from the order denying the motion this appeal is taken.

Defendant contends that the dismissal of the first order and the subsequent refusal of the Court to revive the proceedings were *res adjudicata*, and that plaintiff cannot a second time seek to enforce the same remedy on the same state of facts. But the authorities cited by him do not sustain this contention. It cannot be argued that a dismissal of a complaint, in an action, not on the merits, and a judgment of dismissal is not final and conclusive in the sense that a plea of *res adjudicata* may be founded on it (21 *Am. and Eng. Enc. of Law*, 265, and cases cited). The refusal of the judge who heard the motion, to revive, added nothing to the force of the dismissal. It was doubtless granted on the theory that where the plain-

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tiff has made default, the injunction and all proceedings under the order fall, and cannot be revived. That he did not regard it as *res adjudicata* is clear, because he immediately and on the same day granted the second order in supplementary proceedings.

But defendant further contends that section 2435 of the Code restricts the plaintiff to a single examination of the judgment debtor. There is nothing in the language of the section itself which supports this contention. All that can be fairly drawn from it is that but one order can be instituted at a time. The fact that ten years is the limit fixed by the section within which such proceedings can be commenced would seem to preclude the idea of but a single examination during all that time, and so the Courts have uniformly held (*Methodist Book Concern v. Hudson*, 1 *How. Pr. N. S.*, 517; *Schultz v. Andrews*, 54 *How. Pr.*, 380; *Hamilton v. Morange*, 2 *N. Y. Monthly Bull.* 58; *Carter v. Clark*, 7 *Robt.* 490; *Jurgensen v. Hamilton*, 5 *Abb. N. C.* 149; *Raffings v. Pitman*, 49 *Super.* 307; *Goodal v. Demorest*, 2 *Hill.* 534).\*

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\* A judgment creditor is not permitted to harass his debtor by successive examinations. He is entitled to examine defendant as fully as may be, once. A second order will not be granted as a matter of course. Some good reason must be given therefor. This is so though the second application is upon a different judgment held by the same creditor. *Canavan v. M'Andrew*, 20 *Hun*, 46.

Withdrawal by consent is no bar to a subsequent order. *Carter v. Clarke*, 7 *Robt.* 43.

It seems that the proceedings must be completed or some order terminating them entered before new proceedings can be instituted. *Keihen v. Shipherd*, 16 *Civ. Pro. R.* 183.

The principle that a second order should not be granted unless good reasons are shown, is not jurisdictional, but is only intended to prevent the unreasonable harassing of a defendant; and therefore on a motion to set aside an order for the second examination, it is proper for plaintiff to show more strongly than appeared on the



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But they have also held, that where under one order, the debtor has been fully examined, no subsequent examination should be allowed, unless the moving affidavits show that he has subsequently acquired property, or an *alias* execution has been issued and returned *nulla bona*, or that new facts have come to the knowledge of the applicant (*Irwin v. Chambers*, 40 *Sup.* 432).

As it does not appear from the papers in this case that any new property of the debtor has been discovered, but it does appear that his former examination was completed and signed by him, but not verified, we think that the order denying the motion to vacate the second order should be modified by providing, that if the debtor will appear before one of the Judges of this Court and duly make oath to his examination in the former proceedings, that the motion to vacate the order for the second examination should be granted, otherwise denied. No costs of this appeal to either party.

DAILY, C. J., and BISCHOFF, J., concurred.

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*ex parte* application, that the proceeding was not taken to harass defendant, but with good reason, and to reach property which had come to defendant since the prior examination. *Marshall v. Link*, 20 *Civ. Pro. R.* 109.

A second order may be granted *ex parte*. The affidavit should mention the first order, and allege the reason for requiring a second examination, such as showing that he has since acquired property. *Goodall v. Demarest*, 2 *Hill*. 534.

For further cases, taking the same ground, see *Jurgenson v. Hamilton*, 5 *Abb. N. C.* 149; *Hamilton v. Morange*, 2 *Law Bull.* 58; *Irwin v. Chambers*, 40 *N. Y. Super.* 432; *Cromwell v. Spofford*, 4 *Civ. Pro. R.* 273.

Two orders for examination of a debtor cannot be in force at the same time, both of which defendant must obey. If a judgment debtor refuses to obey an order, and a second one is obtained, he cannot be punished for contempt of the former one. *Gaylord v. Jones*, 7 *Hun*, 480.

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Green v. The Middlesex Railroad Co.

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GREEN v. THE MIDDLESEX RAILROAD COMPANY.

SUPREME COURT, SPECIAL TERM, MONROE COUNTY,  
DECEMBER, 1894.

§ 873.

*Action for personal injuries—physical examination of plaintiff—purpose of—what the affidavit must contain.*

In an action brought to recover damages for personal injuries, where the court or judge has granted an order for the examination of plaintiff before trial, directing her to submit to a physical examination, as required by section 873 of the Code of Civil Procedure, "where the defendant shall present to the court or judge, satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of," such physical examination is deemed necessary to enable the defendant to prepare for the trial, and the order will not be set aside.

When a party seeks to examine his adversary before trial, he must state in his affidavit the facts and circumstances which render such an examination material and necessary, and this cannot be done by simply giving information to the court of the nature of the action and the allegations of the pleadings, unless that information is sufficient to show that the examination asked for is material and necessary.

Where such affidavit is sufficient in form and statement of fact, the court has no discretion, but must grant the order.

In applying for an order directing the physical examination of plaintiff before trial in an action for personal injuries, the defendant need not state in so many words his intention to read the testimony on the trial, if such intention appear by fair inference from other facts; and it is even sufficient to state that he proposes to use the testimony thus obtained, on the trial of the action.

(Decided December, 1894.)

Motion by plaintiff to vacate an order for her examination before trial.

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Green v. The Middlesex Railroad Co.

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The facts are stated in the opinion.

*Charles F. Miller*, for plaintiff.

*J. H. Metcalf*, for defendant.

RUMSEY, J.—The action is brought to recover damages for personal injuries received by the plaintiff because of the negligence of the defendant, and the order for the examination of the plaintiff contained a provision that she should submit to a physical examination by two women physicians named in the order. The plaintiff moves to vacate this order for the insufficiency of the affidavit in two respects: First, that it does not comply with rule 83, by setting forth facts and circumstances to show that the examination was material and necessary for the defendant; and, second, that it is not made to appear by the affidavit that the defendant intends to read the testimony thus taken upon the trial. The affidavit of which complaint is made states fully the nature of the action and the claim made by the plaintiff as to the injuries which she received, from which it appears that the action is one to recover damages for personal injuries. The affidavit further states that the defendant and its officers are ignorant of the nature and extent of the injuries complained of, and there is no denial upon this motion that such is the fact. It appears by fair intendment upon the affidavit that the examination which is sought for is necessary to enable the defendant's experts to qualify themselves for examination, and for that reason it is necessary to enable the defendant to prepare for trial. The plaintiff claims, however, that the application for a physical examination requires proof of precisely the same facts as were required for an oral examination of a party before trial,

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and that it is not sufficient that it shall be made to appear that the defendant desires the examination simply for the purpose of enabling him to prepare himself and his witnesses for the trial. To establish her claim the plaintiff cites the case of *Lyon v. Railway Co.* (142 *N. Y.* 298; 37 *N. E.* 113). In that case it appeared that an order had been made for a physical examination of the plaintiff by two physicians, but there was nothing in the order which required an oral examination of the plaintiff before trial. The Special Term refused to vacate the order, but its decision was reversed at General Term (27 *N. Y. Supp.* 966), and the order of reversal was affirmed by the Court of Appeals. It appears from an examination of the case that the only question presented to the Court of Appeals was whether the order which required the plaintiff to submit to a physical examination, without at the same time requiring an oral examination, was correct in form. The Court of Appeals held that the amendment of 1893, authorizing a physical examination of the plaintiff was to be construed as a part of the original Code of Procedure respecting the examination of a party before trial, and that so construed, it required the physical examination to be had at the same time as an oral examination. For that reason it held that an order requiring the plaintiff simply to submit to a physical examination was erroneous in point of form, and could not stand. The whole case turned upon the form of the order. There was no discussion as to the facts which the affidavit must show, nor was there any suggestion upon that subject. Indeed, there could not have been, because no question was made in the case of the sufficiency of the proof upon which the order was granted. There is no doubt that when a party seeks to examine his adversary before trial he must

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state in his affidavit the facts and circumstances which render such an examination material and necessary. (Rule 83.) This cannot be done by simply giving information to the court of the nature of the action and the allegations of the pleadings, unless that information is sufficient to show that the examination asked for is material and necessary. The rule which requires the statement of these facts has not been changed by the amendment of section 873 of the Code, but there can be no doubt that the amendment to that section has made a very considerable change in the law. Before the amendment it was the settled rule that a defendant in those actions was not entitled to a physical examination of his adversary. *M'Quigan v. Railroad Co.*, 129 *N. Y.* 50 ; 29 *N. E.* 235. The refusal of these examinations undoubtedly puts the defendant to a very great disadvantage in the trial of his case. The extent and nature of the injuries suffered by the plaintiff is always important, and frequently by far the most important of the facts to be presented to the jury, because it is upon proof of the nature and extent of the injuries that the jury must base its conclusions as to the damages which should be recovered. Experience has shown that the damages suffered by the plaintiff was a matter almost exclusively within his own knowledge, and especially was this so when the symptoms were merely subjective. In such a case it almost always happened that the jury had no evidence upon the question of damages except the testimony and declarations of the plaintiff, and his complaints made to his physicians, and the inferences of his physicians drawn from these statements. In such cases it was utterly impossible for the defendant to obtain possession of any facts before trial upon which to base his testimony, or to get any testimony of ex-

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perts except what was given in answer to hypothetical questions based upon the plaintiff's testimony. This condition of affairs frequently resulted in grave miscarriages of justice, and, while this was not always the case, yet it not seldom happened that, when the action was submitted to the jury, the evidence upon the question of damages was so inadequate that the verdicts were exceedingly unsatisfactory. It was to remedy this condition of affairs that the statute in question was passed. It is quite evident that the legislature intended to give the right to a physical examination to enable the defendant to get the information upon these very points as to which he had before then been entirely in the dark.\* The wording of the statute establishes that very satisfactorily. It says that in every action to recover damages for personal injury the court or judge, in granting an order for the

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\* In an action to recover damages for personal injuries, an order for the examination of plaintiff before trial should have been confined to questions as to the time when or place where the accident occurred, and place of residence of plaintiff at that time. *Kinsella v. Second Ave. R. R. Co.* 19 *N. Y. Supp.* 188.

A party cannot be examined before trial for the purpose of obtaining admissions. *M'Mahon v. B'klyn City R. R. Co.*, 20 *Weekly Dig.* 404.

An order for the examination of a defendant will not be made when the object, as disclosed by the affidavits, is to enable plaintiff to prepare for the trial. The plain spirit and intent of the Code is to permit the deposition to be taken only where the testimony is material and necessary to the party for use on the trial of the action. *Weston v. Reich*, 48 *Hun*, 320; *Gilbert v. Third Ave. R. R. Co.*, 49 *N. Y. Supp.* 139.

The object of allowing an examination of the adverse party before trial is to ascertain facts and circumstances either within the knowledge of the parties to the subject of the action, and about which there should be no controversy, or which are necessarily within the knowledge of defendant and essential to the maintenance of the action as existing, and as alleged. *Glen Cove M'fg Co. v. Sutro*, 24 *State Rep.* 1005.

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examination of the plaintiff before trial, may direct that the plaintiff submit to a physical examination. But it goes further than that. In the next sentence it provides that in any action brought to recover damages for personal injuries, "where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of," the court or judge shall order that such physical examination be made. Where that fact has been made to appear, the Court has no discretion in the matter if the affidavit is in other respects sufficient. It seems to me that when it is made to appear that the defendant is ignorant of the nature and extent of the injuries, he has shown sufficient to establish that the examination is necessary and material for his interests. It is not merely a fishing examination which he asks for. The facts which he seeks to prove are purely without the knowledge of the plaintiff. They bear strongly upon the question of damages, and they are necessary to enable the defendant's experts to prepare themselves to give testimony on the trial. An examination for that purpose is widely different from one which is had simply to ascertain whether or not certain facts existed, and if they do, to enable the party obtaining the examination to prepare to meet them. In actions of this nature the facts necessarily exist. A full and complete revelation with regard to them is necessary to the administration of justice, and for that reason, when it has been made to appear, pursuant to the statute, that the defendant is ignorant of the nature and extent of the injuries, which are the material facts, I think he has shown enough to comply with rule 83.

The second objection of the plaintiff is that it has not been made to appear that the defendant intends to

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read the testimony upon the trial. To this there are two answers. It need not be stated in so many words that the defendant intends to read the testimony upon the trial. It is sufficient if that be made to appear by fair inference from any other facts. (*Fogg v. Fisk*, 30 *Hun*, 61 ; *Ball v. Publishing Co.* 12 *Civ. Pro. R.* 4.) But the rule authorizing a physical examination in the presence of two physicians has materially altered the kind of testimony which is to be obtained by these examinations. Not only does the defendant procure the oral examination of the plaintiff, but he also procures the testimony of two expert witnesses, whom he has the right to swear at the trial. This testimony, in the nature of things, is not taken down by the referee, and therefore is not to be read upon the trial, but is to be given *viva voce* in the presence of the jury. For this reason, when the defendant, in asking for such an examination, has stated that he proposes to use the testimony thus obtained upon the trial of the action, he has stated all that, in the nature of things, can be required. The motion to vacate the order for an examination must be denied.

Motion denied.



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Clinton Bank v. Collignon.

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## CLINTON BANK, APPELLANT, v. AUGUST M. COLLIGNON, RESPONDENT.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,  
JANUARY, 1895.

## § 549.

*Order of arrest—fraudulent disposition of defendant's property—  
fraud must be proven—when gift to wife void as to creditors.*

Where, pursuant to the provisions of subdivision 4 of section 549 of the Code of Civil Procedure, the plaintiff has alleged a fraudulent disposition of the property of defendant to support an order of arrest upon that ground; it is necessary in order that the plaintiff should succeed upon the trial of the action that he should prove such fraud.

Where money has been given by the defendant to his wife, and the evidence shows it to have been given with the expectation of having it returned by her, such an alleged gift confers no title in the defendant which can stand against the claims of his creditors.

*(Decided January, 1895.)*

Appeal by the plaintiff, the Clinton Bank, from a judgment of the Supreme Court in favor of the defendant, entered upon the verdict of a jury rendered after a trial at the New York Circuit, and also from an order denying the plaintiff's motion for a new trial made upon the minutes.

The facts are stated in the opinion.

*Clarence Lexow*, for plaintiff, appellant.

*R. W. Todd*, for defendant, respondent.

VAN BRUNT, P. J.—The respondent states this action to have been brought to recover the sum of

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\$6,000 and interest from June 6, 1892, as damages, alleged to have been sustained by plaintiff on account of an alleged disposition by defendant of his property with intent to cheat and defraud his creditors and particularly the plaintiff, after he had incurred the indebtedness herein to the plaintiff. We do not understand this to have been the nature of the action, but rather that the action was to recover upon a promissory note made by the defendant on the 1st day of February, 1892, for \$6,000 payable four months after date ; and, pursuant to the provisions of subdivision 4 of section 549 of the Code of Civil Procedure, the plaintiff alleged a fraudulent disposition of the property to support an order of arrest upon that ground ; and, pursuant to such provisions, it was necessary in order that the plaintiff should succeed upon the trial of the action that he should prove such fraud.\*

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\* The evident meaning of the Code is that in cases of fraud, under section 549, the fraud alleged must be established to the satisfaction of the court, in order to enable plaintiff to recover a judgment. This may be done where defendant fails to answer by applying to the court on affidavit stating the facts, whereupon a reference may be ordered, or the court may hear witnesses upon the application, or issue a writ of inquiry. Judgment cannot be entered as of course by the clerk. *Fayerweather v. Tucker*, 11 N. Y., *Supp.* 89.

Actual intent to defraud should be established. *Hoyt v. Godfrey*, 88 N. Y. 669 ; 15 *Weekly Dig.* 45.

A mere constructive fraud which the law implies because an act done is in violation of the statute or of the rights of creditors at common law is not sufficient. *Sherrill Roper Air-Eng. Co. v. Harwood*, 80 *Hun*, 9.

A party seeking to establish a cause of action, or a right to a remedy against another based upon an alleged fraud, must show affirmatively facts and circumstances necessarily tending to establish a probability of guilt ; if the evidence is capable of an interpretation equally consistent with innocence as with guilt, the former meaning must be given to it. *Morris v. Talcott*, 96 N. Y. 100, *rev'g* 29 *Hun*, 426.

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It is claimed upon the part of the appellant that the learned court upon the trial of this action erred in refusing divers requests to charge made by the appellant's counsel. Upon an examination of these requests it appears that they all except one were couched in language which contained expressions laying down a more stringent rule than was consonant with the law as we understand it, applicable to the case. It is not necessary that we should consider these requests in detail, because they all presented the same general features in this respect and called for a class of proof which does not obtain ordinarily in civil cases. In respect to the request which is not subject to this criticism it does not seem to be applicable to the facts as established upon the trial.

This leaves the question as to whether the verdict of the jury was against the evidence, and whether the court below, upon the motion of the plaintiff, should have set it aside upon that ground. Upon an examination of the case we are of opinion that the court erred in this respect. Much of the story as told by the defendant and his witnesses is in the highest degree improbable, and some of its features show beyond question a fraudulent disposition of property by the defendant, in which the preponderance of evidence would seem to indicate the defendant's wife, who is alleged to have received the property fraudulently misapplied, participated. It appears from the evidence that the defendant had been in business for a number of years prior to the time of his failure in April, 1892. Before such failure he conveyed a considerable amount of property to his wife for the purpose of paying an alleged indebtedness to her of \$14,600, and it is the consideration for this transfer which is attacked. The defendant claimed that this

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consideration was made up of a note bearing date June 1, 1870, for \$1,000, and of another note bearing date January 1, 1892, for \$13,600. It is the consideration for this latter note which is more particularly called in question. It appears that for twenty years prior to the time of his failure the defendant had been keeping house; that he had paid the rent of his house, and had made certain allowances to his wife for running the house. It appears from the testimony of the wife that at various periods during this time she kept boarders or let out furnished rooms, and she claims that a large part of the money which formed the consideration of this note on January 1, 1892, for \$13,600, was what she had accumulated in the business of keeping boarders in the way stated, and which she turned over to her husband, he giving her from time to time notes therefor. The wife was unable to recollect whether it was \$3,000 or \$4,000 of boarders' money and interest, or evidently exactly what amount, came from this source. The balance of the note was made up of money which had been given for Christmas and birthday presents made by the defendant to his wife during this long course of years, ranging from \$25 to \$1,000. The defendant claims to have been in the habit of giving his wife money as presents at Christmas and upon her birthday, and that she was in the habit of returning these moneys to him, he giving her notes therefor. But notwithstanding the observance upon the part of the defendant of the anniversary of his wife's birth by these large and munificent presents, he was unable to give its date. It further appears that no entries whatever were made in the defendant's books according to his own testimony in reference to these notes, and the only account that he had were the notes held by his wife. Then on the 1st of Janu-

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ary, 1892, when he desired to lump the thing, his wife holding two or three notes for different amounts given at different dates, interest was calculated, and this one note was given at \$13,600. But there is no explanation, if the thing was to be lumped, why they did not lump the \$1,000 note of June, 1870, which probably may have had some foundation outside of the imagination of the parties to the transaction. It was sought to reinforce the evidence of the defendant and his wife in regard to the consideration for the \$13,600 note by the testimony of their daughter, who it is stated at the time of the giving of the note of January 1, 1892, calculated the interest, etc. She swears that she was present, and that her mother had some notes, but she knew nothing as to the consideration of the note, and her testimony is of little weight in considering the main question as to whether this was not a scheme gotten up by this defendant for the purpose of laying aside something for a rainy day at the expense of his creditors. That the defendant is utterly unworthy of belief is clearly established. He says in accounting for the diminution of his assets, that he lost some \$20,000 speculating in stocks in the office of Henry Clews & Co. He then states that he lost \$20,000 more in a broker's office down town, whose name he does not know, and of the location of which he is ignorant; and that although he kept a bank account and was perfectly familiar with the methods of business, he carried his money down there in bills, at one time having \$12,000 in his pocket, and that he was recommended to this place by somebody he did not know, but he thought it was all straight. How this defendant could possibly expect anybody but children of very credulous years to believe such a story it is impossible to imagine. It is so false upon its face that it does

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not need comment to point its incredibility. We further find that the defendant seems to have made representations in regard to his property which were inconsistent with the truth if this indebtedness to his wife existed. And it seems to us that the whole story is of such a fictitious character that it can have but little weight in a court of justice. If these moneys were ever given by the defendant to his wife, it is manifest from the evidence that it was with the expectation that they should be returned—loaned by her as he calls it—and that there was no expectation that she should retain possession of the same. Such an alleged gift could confer no title in the defendant which could stand against the claims of his creditors. It seems to be unnecessary to discuss the evidence in detail, as the general features which have been above-mentioned are sufficient to characterize the whole attitude of the defendant and to show that, in order that he might secrete some of his property from his creditors, it was necessary that he should invent losses which he had never sustained. With this feature in the case it was evident that the defendant's intentions were fraudulent, and that was all that was necessary to maintain the action.

The order denying the motion for a new trial should be reversed and the verdict set aside and the judgment vacated, with costs of appeal, and a new trial granted upon the plaintiff's paying the costs of the trial in the court below.

FOLLETT and PARKER, JJ., concurred.

Order denying motion for new trial reversed and verdict set aside and judgment vacated, with costs of appeal, and new trial granted upon plaintiff's paying costs of trial in the court below.

FOX, *et al.*, v. MATTHIESSEN.

SUPREME COURT, GENERAL TERM, SECOND DEPARTMENT, FEBRUARY, 1895.

## § 1316.

*What is an intermediate order—an order denying a motion to set aside a verdict on the ground of misconduct of a juror, not an intermediate order.*

Under section 1316 of the Code of Civil Procedure providing that an appeal from a final judgment brings up for review "an intermediate order which is specified in the notice of appeal and necessarily affects the judgment," does not include an order denying a motion to set aside a verdict on the ground of surprise, irregularity in the trial and misconduct of one of the jurors.

An intermediate order is one made between the commencement of the action and the time the successful party had a right to enter final judgment.

A plaintiff has no right to withhold a part of his testimony when it comprises part of his original case, until he has ascertained how far defendant's testimony would contradict him and then offer the balance in rebuttal.

(Decided February 11, 1895.)

Appeal from a verdict rendered at the Westchester County Circuit in favor of defendant.

The facts are stated in the opinion.

*James M. Hunt*, for plaintiff, appellant.

*Martin J. Keogh*, defendant, respondent.

BROWN, P. J.—This action was brought to recover commissions upon the purchase price of certain sugar refineries alleged to have been earned under an agree-

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ment with the defendant. Upon the trial the jury rendered a verdict for the defendant. The verdict was rendered on April 12, 1894, and an order entered on that day denying a motion for a new trial on the judge's minutes, but judgment was not entered until June 16th. On May 5th the plaintiffs moved at Special Term, upon affidavits and upon the minutes of the trial, to set aside the verdict, and for a new trial upon the ground of the misconduct of a juror ; and an order denying such motion was made and entered on May 10th, and on May 26th another motion was made to settle the order of May 10th which was denied upon the same date, and an order duly entered. The notice of appeal in this case is from the judgment, and states that the plaintiffs intend to bring up for review at the same time the order denying plaintiffs' motion for a new trial upon the minutes and the orders of May 10th and May 26th. There is no appeal from any of the orders, except in the manner and form stated. The form of the appeal does not bring before us for review the orders of May 10th and May 26th. Those were not intermediate orders. Section 1316 of the Code provides that an appeal from a final judgment brings up for review "an intermediate order which is specified in the notice of appeal and necessarily affects the judgment." A notice of appeal from a judgment which specified an order denying a motion for a new trial on the judge's minutes was held, under this section, to bring up such an order for review. *Hymes v. Van Cleef*, (*Sup.*) 15 *N. Y. Supp.* 343 ; *Pfeffer v. Railway Co.* (*Super. Buff.*) 24 *N. Y. Supp.* 490. But an order denying a motion to set aside a verdict on the ground of surprise, irregularity in the trial, and misconduct of one of the jurors has been held not to be an inter-



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mediate order necessarily affecting the judgment.\* *Selden v. Canal Co.* 29 N. Y. 635; *Hymes v. Van Cleef (Sup.)* 15 N. Y. Supp. 341. In the last case the court defined an "intermediate order" to be one made between the commencement of the action and the entry of the judgment from which the appeal is taken. The orders appealed from in this case fall within the letter of that definition, but they do so merely from the fact that the defendant delayed entering the judgment long after he was entitled to do so, and not from any connection existing in law or fact between the orders and the judgment. The motions were not addressed to the trial court, but to the Special Term, long after the circuit adjourned; and while it is a fact that, had they been granted, judgment would not have been entered, it is equally the fact that there was the legal right to enter the judgment immediately upon the rendition of the verdict, and neither the motions nor the orders that the court might make therein necessarily affected that right; and if it was necessary for us to define an "intermediate order," we should designate it as one made between the commencement of the action and the time the successful party had a right to enter final judgment. We are of the opinion, therefore, that the orders denying a new

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\* The orders which can be reviewed are those made in the progress of the action and before the judgment from which appeal is taken, and by which the judgment was necessarily affected. *Hunt v. Chapman*, 62 N. Y. 333.

An order denying a motion for a new trial, is not brought before General Term by, and is not reviewable on, appeal from a judgment as an intermediate order involving the merits and necessarily affecting the judgment; the court is confined on such an appeal to review of the exceptions taken on the trial, and its order is renewable by the Court of Appeals. *Thurber v. Harlem B. M. & F. R. R. Co.*, 60 N. Y. 326.

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trial for the misconduct of the juror are not before us for review, and the appeals therefrom are dismissed.

Upon the merits of the case, the testimony was of a most conflicting character. The jury adopted the defendant's version of the case, and their determination of the facts is final. The exceptions to the exclusion of testimony are not sustained. The testimony offered in rebuttal was properly excluded. The facts which it was sought to bring out were not material to the controversy. It was not denied that Leonard and defendant had had frequent conversations both at their respective homes and on the trains. The facts that defendant might have been frequently at Leonard's home, or that he was there on a Sunday afternoon when Leonard started for Philadelphia, or that he once had a long conversation with Leonard on the train, were all corroborative of Leonard's testimony, and, if they had any relevancy to the case, tended to establish Leonard's version of the contract. It was therefore a part of his original case, and he had no right to withhold a part of his testimony until he had ascertained how far defendant's testimony would contradict him, and then offer the balance in rebuttal. It was discretionary with the court how far it would permit a reopening of the case on rebuttal, and its ruling in that respect is not reviewable on appeal. We have examined the other exceptions, but there are none that require notice.

The judgment and order denying a new trial on the judge's minutes must be affirmed, with costs, and the appeals from the orders of May 10th and May 26th are dismissed, with \$10 costs and disbursements.

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Outhouse v. Odell.

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## OUTHOUSE v. ODELL.

SUPREME COURT, GENERAL TERM, SECOND DEPARTMENT, FEBRUARY, 1895.

§§ 1835, 1836, 2718.

*Reference of claim against decedent's estate—disbursements will be allowed.*

Section 2718 of the Code of Civil Procedure, as amended by Laws 1893, chapter 686, providing that on the entry of an order of reference of a claim against a decedent's estate, the proceedings shall become an action in the Supreme Court, and that the reference shall be governed on the question of costs, by sections 1835 and 1836 of the Code, does not change the existing rule that disbursements may be allowed even though no reference is made to them in said sections.

Larkins v. Maxon, 103 N. Y. 690, followed.  
(Decided February 11, 1895.)

Appeal from Special Term, Orange County.

Claim by Sylvester Outhouse against Angeline Odell, as executrix of Rachael Tompkins, deceased, for \$30,000, which was referred under the statute. The referee found in favor of claimant for \$630, but without costs. Claimant then presented to the clerk a bill for disbursements, amounting to \$255.74. Objection was made thereto by the attorney for the executrix. The clerk overruled the objection, and taxed the disbursements at the sum of \$255.74. Defendant appealed from the taxation to the Special Term, where it was affirmed. From the decision of affirmance, defendant appeals. Affirmed.

W. H. H. Ely, for defendant, appellant.

Smith Lent, for plaintiff, respondent.

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PRATT, J.—It is clear from an examination of the case of *Larkins v. Maxon*, 103 N. Y. 680, 9 N. E. 56, that the provisions of the old Code (section 317) were not repealed by Laws 1880, chap. 245 ; Code Civil Procedure. At the time this decision was rendered, sections 1835 and 1836 of the Code of Civil Procedure were in force, and now are in force, and section 317 of the old Code is in force, unless repealed by chapter 686 of Laws of 1893.\* The chapter last mentioned provides that, on the entry of the order of reference, the proceeding shall become an action in the Supreme Court, and that the reference shall be governed on the question of costs by sections 1835 and 1836 of Code of Civil Procedure.† We therefore see that sections 1835 and 1836

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\* The provision referred to amends Code of Civil Procedure, section 2718.

† The costs are not controlled by the provisions of 1835, 1836, in reference to costs, in an action against an executor or administrator in his representative capacity, and the court has power to award costs, although the claim was not presented "within the time limited by a notice published, as prescribed by law, requiring creditors to present their claims." *Denise v. Denise*, 110 N. Y. 562, aff'g, 41 Hun, 9.

Costs may be awarded though the conditions precedent to the right to award costs in an action are absent. *Hendricks v. Isaacs*, 52 Hun, 100.

When the report is for the claimant, he is entitled, against the executors, to necessary disbursements, including referee's fees, although the court may have adjudged he is not entitled to costs. *Newton v. Sweet*, 2 C. R. 61.

Costs awarded are the disbursements and not necessarily the allowance provided for in the fee bill in respect to actions, and an order awarding costs in such a proceeding which provided that they should be "taxable costs," should be modified by striking out the words "taxable costs." *Blankman v. M'Queen*, 19 Civ. Pro. R. 290.

Executor can claim disbursements only. *Van Sickler v. Graham*, 7 How. Pr. 208 ; *Hallock v. Bacon*, 69 Hun, 90. See also *Larkins v. Maxon*, 103 N. Y. 680 ; *Hatch v. Stewart*, 42 Hun, 164 ; *Krill v. Brownell*, 10 Civ. Pro. R. 8 ; *Overheiser v. Morehouse*, 8 Civ. Pro. R. 11.

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of Code of Civil Procedure are not inconsistent with section 317 of the old Code, and that disbursements can be allowed where no costs are given by the decision. A distinction between costs and disbursements seems to have been maintained ever since the passage of section 317 of the old Code. The Laws of 1893 (chapter 686) make no reference to disbursements whatever ; therefore there has been no change in the law in regard to disbursements since the decision in *Larkins v. Maxon, supra*. The Laws of 1893, before referred to, besides making the proceeding an action in the Supreme Court, provided that the referee, in allowing or withholding costs, should be governed by sections 1835 and 1836 of the present Code ; and, as we have already seen, those sections make no reference to disbursements, and, notwithstanding those provisions, disbursements can be allowed. A remarkable construction is that the legislature, by passing chapter 686 of laws of 1893, only intended to substitute a reference under the Revised Statutes for one under the Code, as they make no mention of disbursements in that statute. By not repealing section 317 of the old Code, and making no allusions to the subject, I think it a fair inference that the legislature intended to make no change in the existing law on that subject. With some hesitation, we feel constrained to affirm the order, with \$10 costs and disbursements.

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Gottchius v. McGoldrick.

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PEOPLE, ETC., *ex rel.* GOTTCHIUS v. MCGOLD-  
RICK, CLERK, ETC.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,  
MARCH, 1895.

§§ 825, 2433.

*Supplementary proceedings are special proceedings—papers therein should be filed with the county clerk—when a writ of mandamus compelling them to be so filed will not lie.*

Under section 825 of the Code of Civil Procedure, declaring that a return, or other paper, in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered with the clerk of the county in which the special proceeding is taken if it is before a county officer or a judge of a court established in a city. *Held*, that the examination of a defendant, taken in proceedings supplementary to execution, is a paper in a "special proceeding," and as such must be filed with the County Clerk.

If any provision contained in the General Rules of Practice conflicts with any section of the Code, such provision is a nullity, as the Judges have no power to make a rule which conflicts with a statute.

A writ of mandamus does not issue as of right, but whether it shall issue rests in the sound discretion of the Court; and it does not usually issue where the relator has another adequate remedy.

*It seems*, Where the question involved in an action relates to the final disposition of papers in special proceedings instituted in a certain Court, the determination of that question should, in the first instance, be made by the Judges of that Court.

(Decided March 18, 1895.)

Application for a writ of mandamus to compel the clerk of the City Court to deliver to plaintiff's attorney the examination of a defendant, taken in

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supplementary proceedings, in order to file the same with the County Clerk.

*Stephen B. Brague*, for the relator.

*John B. McGoldrick*, defendant in person.

ANDREWS, J.—This is an application for a writ of mandamus to compel the clerk of the City Court to deliver to plaintiff's attorney the examination of a defendant, taken in proceedings supplementary to execution, in order that the same may be filed with the County Clerk. There can be no doubt that proceedings supplementary to execution are "special proceedings," for they are expressly declared to be such by section 2433 of the Code; and section 825 of the Code declares that a return, or other paper, in a special proceeding, where no other disposition thereof is prescribed by law, must be filed and an order therein must be entered with the Clerk of the County in which the special proceeding is taken if it is before a county officer or a Judge of a Court established in a city. As I understand the matter, there is no other statute which prescribes what disposition shall be made of papers in special proceedings instituted in the City Court, and it therefore seems to me clear that such papers should be filed with the County Clerk. If any provision of rule 2 of the General Rules of Practice conflicted with the above cited provision of said section 825 such provision would be a nullity, as the Judges have no power to make a rule which conflicts with said section. I am of the opinion, however, that no provision of said rule does conflict with said provision of said section 825, for the rule, by its own terms, applies to those cases only where no pro-

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vision is made by the Code, and in this case provision is made by said section 825. This conclusion seems to me to be in accord with that of the General Term of the Superior Court in *Fiske v. Twigg* (50 *N. Y. Superior Ct. Rep.* p. 69).<sup>\*</sup> Nevertheless, I think that the present application for a writ of mandamus should be denied for several reasons: First. A writ of mandamus does not issue as of right, but whether it shall issue rests in the sound discretion of the Court; and it does not usually issue where the relator has another adequate remedy. In the present case the relator has an adequate remedy by an application to a Judge of the City Court to require the clerk to file the papers in the office of the County Clerk, and, if such application is denied, by an appeal to the General Term of the City Court; and if the order denying the application is affirmed, by a further appeal to the General Term of the Court of Common Pleas. Secondly: The question involved relates to the final disposition of papers in special proceedings instituted in said Court, and it seems to me that the determination of that question should, in the first instance, be made by the Judges of that Court. Moreover, it appears that the identical question now presented was brought before the Chief Justice of that Court several years ago, and he came to a conclusion different from that reached by me, and decided that the examinations of judgment debtors, taken in supplementary proceedings instituted in that Court, should be filed with the clerk

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<sup>\*</sup> Supplementary proceedings are special proceedings and the depositions of witnesses, taken thereon, must be filed with the County Clerk, though they were not used upon the application for the order, which was thereafter entered, appointing a receiver, and though the testimony was taken down and written out by a stenographer paid by plaintiff's attorney. *Fiske v. Twigg*, 5 *Civ. Pro. R.* 41; 50 *N. Y. Supr.* 69.



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of the said Court (*Abb. N. C.*, vol. 22, p. 438). No appeal was taken from the order entered upon this decision, and it appears by the affidavit of the clerk that, in compliance therewith, vast numbers of papers have been retained by him and are now on file in his office; and that this is the only instance in which it has been claimed that it was not his right and duty to do so. Under these circumstances, for this Court to now issue the writ asked for would be to disregard the salutary rule *stare decisis*, to embarrass the clerk in the discharge of the duties of his office and place him in the awkward position of being compelled to disregard the decision of the former Chief Justice of his own Court in order to comply with the writ. I think the relator should be left to his remedy by motion in the City Court.

Motion denied without costs.

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GEORGE LEWIS PRENTISS, AS GENERAL GUARDIAN OF MARIE CARLETON, INFANT, APPELLANT,  
v. ELLEN BOWDEN, RESPONDENT.

NEW YORK COURT OF APPEALS, MARCH, 1895.

§§ 1379, 1380, 1381.

*Action by judgment creditor to set aside conveyance—necessity of exhausting remedy at law—execution against property of dead man, without leave of court and surrogate, absolutely void.*

An execution, issued against the property of a judgment debtor after his decease, without notice to his representatives, and permission of the court which rendered the judgment and of the proper surrogate as provided for in sections 1380, 1381 of the Code of

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Civil Procedure, is nugatory and absolutely void, and cannot serve as a fulfillment of the condition precedent to the maintenance of an action in equity to set aside a conveyance of land made to defraud creditors, and appropriate the property to the payment of the debt.

(*Decided March, 1895.*)

Action by judgment creditor to set aside a conveyance alleged to be fraudulent.

Material facts are stated in the opinion.

*W. R. Wilder*, for plaintiff, appellant.

*Benjamin Patterson and George Bell*, for defendant, respondent.

FINCH, J.—There is no ambiguity in the character and scope of this action. It is brought by a judgment creditor against the grantee of his debtor to set aside a conveyance of land as made in fraud of creditors and to appropriate the property to the payment of the debt. The plaintiff sues for herself alone and in her own sole right as judgment creditor. She joins no other creditors and does not sue for their benefit, but exclusively for her own. It is of course a necessary condition of a right to invoke the aid of equity in such a case that the creditor should have first exhausted her remedy at law by the issue and return of an execution unsatisfied in whole or in part. The plaintiff issued such an execution, but not until the debtor was dead. That death occurred between seven and eight o'clock in the morning and execution was issued four or five hours later on the same day. The courts below have held that the execution was nugatory and absolutely void, and cannot serve as a fulfillment of the condition precedent to the maintenance of the action.

The whole controversy turns upon that point. It is technical in its character, and yet the rule subserves an important and substantial purpose. Equity intervenes always for a reason and never needlessly ; and, declining its relief when there is a sufficient and adequate remedy at law, is obliged to say by what proof it shall be established that the remedy at law has been tried and failed. It has selected for that proof the issue and return of an execution, both because that is the natural and usual mode of enforcing the legal right, and because it is easy to prove or disprove and involves no necessary dispute. We are not at liberty, therefore, to disregard it as a needless and unmeaning ceremony.

An execution against the property of a dead man, without notice to his representatives on the permission of the Surrogate, is wholly unauthorized. The Code explicitly forbids it (§ 1379), except as provided in the next two following sections. These provide that the leave of the Court which rendered the judgment and of the proper Surrogate must be first obtained, and the mode and manner of securing the permission is pointed out. Without such permission the execution is forbidden, and not merely voidable, but absolutely void. We so held in *Wallace v. Swinton* (64 N. Y. 188). The appellant seeks to escape the effect of that case upon the ground that it declares the execution absolutely void against those who are not made parties to proceedings authorized by law for revival of the judgment against their property, and that the defendant is in fact executrix of the deceased judgment debtor and caused herself to be made a party to the judgment for the purposes of an appeal. But she did that five weeks after the execution had been returned and when the invalidity of that writ was already conclusively

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settled. Cases also are cited in which it has been held that such an execution is merely voidable, but they are of little utility because entirely unaffected by a peremptory statute forbidding utterly the issue of such an execution, except only after the prescribed notice and permission. It is urged also that the validity of the execution cannot be assailed collaterally. The cases declaring that doctrine are cases of irregularity merely, and not those in which the execution was absolutely void. It is further said that there are exceptions to the general rule requiring the issue and return of an execution, and one of them is when that preliminary step is impossible. But it was not necessarily impossible in the present case. On a proper application leave might have been granted. The truth is the plaintiff is seeking an advantage for herself above and beyond that belonging to the other creditors of the deceased. Our whole theory of administration rests upon the idea that when a man dies his estate shall answer to his creditors equally and without preference, and the Surrogate is purposely made master of the situation to prevent inequality of payment. This plaintiff could undoubtedly have maintained an action for the benefit of all the creditors, after refusal of the representatives to set this conveyance aside, but instead of that she is seeking, by an ordinary creditor's action, to secure payment of her own debt regardless of what may happen to others. For the effort now made to turn the action into one of the permitted character has too many difficulties in the way to succeed. Something of that kind was done in *National Tradesman's Bank v. Wetmore* (124 N. Y. 241); but there the question was not raised by the answer, while here the facts which raise it are fully pleaded. The death of the debtor before

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the issue of execution, the probate of his will, the appointment of John S. Wetherley and the defendant Ellen Bowden as executors are each alleged. If a request to Ellen as executrix to disaffirm her own title would be needless because absurd, that fact is not true of the executor, and his right cannot be arbitrarily set aside. And where the creditor may sue in behalf of the representatives refusing to do their duty, that fact should be alleged and such representatives be made parties defendant (*Harvey v. McDonald*, 133 N. Y. 531). The executor Wetherley is not made a party at all, and the executrix only as an individual. The plaintiff, however, though failing in this action, may hereafter pursue the other remedy.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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LOUIS PROWEEDER, GUARDIAN *ad Litem*, RE-  
SPONDENT, v. SAMUEL LEWIS, APPELLANT.

CITY COURT OF NEW YORK, GENERAL TERM,  
JANUARY, 1895.

§ 723.

*Error in entitling an action merely formal and can be amended—  
infant competent to testify may make an affidavit to produce  
order of arrest.*

An error made in entitling an action brought by an infant through his guardian *ad litem*, in not naming the infant first and the guardian afterwards, is merely formal and may be amended under section 723 of the Code of Civil Procedure.

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*Proweeder v Lewis.*

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An infant who possesses intelligence enough to understand the nature of an unprovoked assault and its effects upon his person and who understands the nature of an oath and the consequences of its violation, is competent to testify upon the trial of an action, and is therefore competent to make the affidavit necessary to obtain the provisional remedy of arrest in aid of his action.

(Decided January, 1895.)

Appeal by defendant from an order denying a motion to vacate order of arrest, and amending title of action.

*Goldfogle & Cohn*, for defendant, appellant.

*N. S. Levy*, for plaintiff, respondent.

EHRLICH, Ch. J.—The action was begun under the above title, instead of “Samuel Proweeder, an infant, by Louis Proweeder, his guardian,” etc.

The affidavit upon which the order of arrest was issued was made by the infant, and alleged an assault and battery committed upon him, from the effects of which his nose became swollen, his left eye discolored and his left ear bruised.

That it was an action by the infant by his guardian *ad litem* was made evident by every allegation and feature throughout the proceeding.

For the error in not naming the infant first and the guardian afterwards, the defendant sought to vacate the order of arrest. The court below denied the motion, and directed that the title of the action be amended so as to read in the proper form. The defect was formal merely, and amendable under section 723 of the Code, almost as of course. It was also urged by the defendant that the infant, being of the age of ten years, could not make the affidavit on

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Oishei v. Craven.

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which the arrest was founded. There is nothing in the case which intimates that the infant was so devoid of intelligence as not to understand the nature of an unprovoked assault and its effects upon his person, or which would justify a ruling that the infant did not know the nature of an oath and the consequences of its violation. It will, therefore, be inferred that he would be competent to testify upon the trial, and if competent there, we cannot hold that he would be incompetent to make the preliminary affidavit necessary to obtain the provisional remedy of arrest in aid of his action.

At all events, the justice below exercised his discretion which was not abused ; and the order appealed from must be affirmed, with costs.

FITZSIMONS and CONLAN, JJ., concur.

Order affirmed with costs.

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ACHILLE J. OISHEI v. JAMES B. CRAVEN.

SUPERIOR COURT OF BUFFALO, GENERAL TERM,  
JANUARY, 1895.

§ 534.

*Action on promissory note—what allegations are necessary.*

In an action on a promissory note, it is sufficient to allege that said note was "assigned, transferred, delivered, and indorsed," to the plaintiff. This allegation creates the presumption that the note was lawfully delivered by the owner and that plaintiff has title.

It is not necessary to allege consideration for the assignment, for if it be the fact that it is assigned, it is of no consequence whether it be for value or not.

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An allegation that the note is due and that no part of it has been paid ; that it has been protested, all of which has damaged the plaintiff in a certain amount, for which sum and interest judgment is demanded, is sufficient without stating that there is due the plaintiff on this note the sum named or any other sum.

(Decided January, 1895.)

Demurrer to complaint, upon the ground that it does not state facts sufficient to constitute a cause of action.

*Charles Oishei*, for plaintiff.

*C. S. Crosser*, for defendant.

HATCH, J.—The pleading is upon a promissory note and is in attempted compliance with section 534, Code. It first alleges that on a given date defendant for value made and delivered his promissory note to one Vendello. It then sets out the note :

BUFFALO, N. Y., December, 1893.

“Six months after date I promise to pay to the order of M. Vendello three hundred and thirty-one (\$331.02) dollars and two cents at Third National Bank, Buffalo, N. Y. Value received.

J. B. CRAVEN.”

*Second.*—Alleges that on or about the 20th day of February, 1894, said note was “assigned, transferred, delivered and indorsed” to the plaintiff.

*Third.*—That no part of the said note, which is due, has been paid ; that on the 2d day of July, 1894, it was protested for non-payment, “all to the damage of the plaintiff in the sum of \$332.23, and interest from said second of July. Then demands judgment for the last mentioned sum, with interest and costs.

The first objection is, that it is not alleged that



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the owner ever transferred the note to plaintiff. But it is alleged that the note was assigned, transferred, delivered and indorsed to the plaintiff. This allegation creates the presumption that the note was lawfully delivered and that the plaintiff has title. In *Prindle v. Caruthers*, 15 N. Y. 431, the allegation was that the contract became plaintiff's property by purchase, and the Court say: "The allegation cannot be true unless he purchased of the parties having the lawful right to dispose. The whole matter will be capable of litigation on the trial."

Legally this note could not be assigned and delivered to plaintiff except by one having right and title so to do. But it is not necessary to allege this; it is sufficient to aver the fact of assignment and delivery. So, in *Hays v. Hathorn*, 74 N. Y. 491, it is said "the production of the paper by him was *prima facie* evidence that it had been delivered to him by the payee and that he had title to it." These are cases upon which defendant relies. But this doctrine supports the allegation of the complaint. It is not necessary to allege consideration for the assignment, for if it be the fact that it is assigned it is of no consequence whether it be for value or not. Certainly the maker cannot complain. It is said that the complaint does not allege the facts required by section 534 of the Code, in that it fails to state that there is due the plaintiff on this note the sum named therein or any other sum. This is true, but it does not follow that the complaint is bad for that reason. It does allege that the note is due and that no part of it has been paid; that it has been protested, all of which has damaged the plaintiff \$332.23, for which sum and interest judgment is demanded. We have no difficulty in spelling out of this allegation that defendant

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has made default in payment of his note or any part of it, and that he is now owing thereon, and that plaintiff is entitled to the sum due. It does not comply with section 534, Code, because it does not state in place of "to the damage," etc., "that there is due to the plaintiff thereon." But it does, imperfectly and poorly, yet sufficiently, comply with section 481 in that it does, coupled with the other allegations, state a cause of action. *Smith v. Fellows*, 26 *Hun*, 384; *Vogle v. Kirby*, 4 *N. Y. Supp.* 99; *Keteltas v. Myers*, 19 *N. Y.* 231; *Sanders v. Soutter*, 126 *Id.* 193.

Judgment should be ordered for plaintiff on the demurrer, with costs, with leave to defendant to answer in twenty days on payment of costs.

TITUS, Ch. J., and WHITE, J., concur.

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MATTER OF BLAIR.

SUPREME COURT, SPECIAL TERM, CHAMBERS.

§§ 1312, 1327, 1330, 1331.

*Undertaking on appeal—where to apply for order fixing the amount.*

Where, on an appeal from a judgment of the General Term to the Court of Appeals, a motion is made for an order fixing the amount of the undertaking to be given by the appellants and dispensing with an undertaking on the part of one of the appellants as executor, the proper practice is to have the application made to that branch of the court from which the appeal is taken.

(Decided March 25, 1895.)

Motion for an order fixing the amount of an undertaking to be given by appellants, upon appeal from

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Matter of Blair.

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a judgment of the General Term to the Court of Appeals.

*William Blair*, for the motion.

*Potter & Kelvert*, opposed.

PATTERSON, J.—This motion was made at the Special Term for an order fixing the amount of the undertaking to be given by the appellants upon appeal from a judgment of the General Term to the Court of Appeals for the purpose of obtaining a stay of proceedings, and dispensing with an undertaking on the part of one of the appellants as executor. The question of practice presented is, whether such motion should be made at the Special Term or General Term. By section 1312 of the Code of Civil Procedure, it is provided that the Court in or from which the appeal is taken may limit the amount of or dispense with security in certain cases. By section 1327, which regulates appeals to the Court of Appeals, the kind of security to stay execution on a judgment for money is specified, and as therein provided, the Court may at any time afterwards, on satisfactory proof that the sum so fixed is insufficient in amount, make an order requiring the appellant to give a further undertaking. Where the judgment is for a chattel or the delivery of personal property, the appellant must give an undertaking in a sum fixed by the Court below or a Judge thereof. By section 1330, what must be done upon an appeal from a judgment or order directing the execution of a conveyance is stated. And by the next section (1331), security to stay execution on a judgment for the possession of real property, when required, shall be in the form of an undertaking which, in addi-

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tion to the other requirements, shall be in a sum "fixed by a Judge of the Court below." It will thus be noticed that the kind of undertaking or security to be given to obtain a stay will depend upon the character of the judgment. As to certain judgments, the Court below or the Court to which the appeal is taken may fix the terms of the security, and in some cases dispense with it; and in other cases again, where it is a question of fixing the amount of security, not only the Court below, but any Judge thereof, has the power so to fix it. Without, therefore, passing upon the question of the right of the Judge at Special Term in certain cases, such as appeals from money judgments, to determine the amount of security, I think that where, as here, there is a dispute as to the character of the judgment and the appeal is from a judgment of the General Term, the proper practice would be to have the application made to that branch of the Court to fix the amount of the undertaking and to determine whether one of the appellants designated as an executor has the right to appeal without giving any security. While it is true that the General Term is the Supreme Court, or the same Court as the one in which the Special Term Judge sits, it is a different part thereof, and it would be unnecessarily burdening the Special Term to require it, or a Judge of the Court not a member of the General Term, to construe the character and effect of the judgment appealed from. The General Term, having rendered the judgment, is in the best position to determine its character and scope.\* I think,

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\* An application for an order dispensing with or limiting the security required to stay execution on appeal to the Court of Appeals may not be made in that court, but should be made to the court "in or from which the appeal is taken." *It seems*, that the only cases where the application may be made to the court to which the appeal

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therefore, that the application should be made to the General Term, and this motion is accordingly denied, with leave so to apply.

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THE NEW YORK BOARD OF FIRE UNDER-  
WRITERS v. METROPOLITAN LLOYDS OF  
NEW YORK CITY, BEECHER & CO., AS CHIEF  
EXECUTIVE OFFICERS OF METROPOLITAN LLOYDS  
OF NEW YORK CITY, PERFORMING CORRESPONDING  
FUNCTIONS OF TREASURER THEREOF.

SUPREME COURT, SPECIAL TERM, N. Y. COUNTY,  
MARCH, 1895.

§ 530.

*Act incorporating Board of Fire Underwriters—public act—need not  
be pleaded by its title as well as by its chapter and date of passage.*

An Act incorporating the New York Board of Fire Underwriters held to be a public act as to its sections regulating the fire patrol, and therefore, when pleaded, it need not be set forth by its title as well as by its chapter and year of passage, under section 530 of the Code of Civil Procedure, prescribing the form and manner of pleading a private statute.

A private act which contains some provisions of a public nature, is *pro tanto* a public act.

The Legislature has the power to regulate the insurance business, and therefore a provision in an act, for an assessment upon those engaged in the business for the support of fire patrol, in proportion to premiums received, will be sustained.

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is taken (except where the appeal is in the same court which rendered the judgment or made the order appealed from) are those where the appeal is in the Supreme Court from an inferior court or to a General Term of the Supreme Court, or to a superior city court in a special proceeding (*Hills v. Peekskill Sav. Bank*, 95 N. Y. 675).

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An allegation in a complaint that certain persons perform "corresponding functions of a treasurer," sufficiently designates them as such, although they may not bear the title.

(Decided March 26, 1895.)

Demurrer to complaint.

The facts are stated in the opinion.

*John Berry*, for plaintiff.

*W. C. Beecher*, for defendants.

BEEKMAN, J.—Upon a careful examination of the questions raised by the demurrer in this case, I have come to the conclusion that I would not be justified in rejecting the complaint as insufficient, although it rests quite upon the border line. If the statute upon which the plaintiff relies for his cause of action is a private act, it certainly has not been properly pleaded, under section 530 of the Code of Civil Procedure, which requires the *title* of the act to be set forth as well as its chapter and year of passage where that form of pleading is resorted to.\* I am, however, inclined to

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\* A private and local act must be pleaded, but if it contain some provisions, neither private nor local, these when relied on, need not be pleaded (*Bretz v. Mayor*, 6 Rob. 325).

If the facts stated bring the case within a public statute, it need not be referred to (*McHarg v. Eastman*, 7 Rob. 137).

In pleading the statutes of another State, only their legal effect need be averred (*Robarge v. Cent. Vt. R. R. Co.*, 18 Abb. N. C. 362).

Statutes of another State must be averred in the same manner as other facts; an allegation that by the laws of another State, certain conclusions result, as that certain trusts are valid, is not good (*Throop v. Hatch*, 3 Abb. 23).

When pleading a statute as sanctioning a defense or giving a right, it is safest to follow the words of the statute (*Ford v. Babcock*, 2 Sand. 518).

It is enough to aver that a contract sought to be enforced is in violation of some municipal ordinance or enactment, when such ordinance or enactment is founded upon a statute, the statute need not be specially pleaded (*Beman v. Tagnot*, 5 Sand. 153).

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N. Y. Board of Fire Underwriters v. Beecher & Co.

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the view that the act in question is a public act ; at least so far as the portions of it upon which the cause of action rests are concerned. It is, at times, difficult to determine in which category a particular statute falls. Abbott, in his Law Dictionary, defines a private act to be "an enactment which does not affect the public at large, but bears upon individuals only ; such as an act settling the title to or authorizing the sale of a particular parcel of land ; an act allowing a person's claim against government and directing payment." Sedgwick, in his work on statutory construction, says: "In this country, the disposition has been, on the whole, to enlarge the limits of the class of public acts and to bring within it all enactments of a general character or which in any way affect the community at large." This disposition is illustrated by the remark of the Chancellor in the case of *Bank of Utica v. Smedes* (3 Cowen, 662), in which he says that he is not prepared to admit that "a law incorporating a bank, without declaring the law to be a public statute, is a private act, which must be recited in every suit against the corporation. These institutions," he remarks, "are public in their nature and character and their operations affect the whole community."

It is also a recognized principle that a private act which contains some provisions of a public nature is *pro tanto* a public act. Now, in the case at bar, while the act in question is entitled "An act to incorporate the New York Board of Fire Underwriters," and as its title imports, confers corporate capacity upon that board, with functions largely of a private nature, certain powers are also vested in the corporation which directly affect and concern the interests of the public at large. These powers relate to the organization and operations of the fire patrol in this city. By section 6

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of the act (chapter 846, Laws of 1867) the board is authorized to provide a patrol of men to discover and prevent fires "with suitable apparatus to save and preserve property or life at and after a fire." Full power is given to them, in the performance of their duties, "*to enter any building on fire or which may be exposed to or in danger of taking fire from other burning buildings,*" and they are placed under the control of the Fire Department while on duty at a fire. The State has thus delegated to this body a certain measure of its police power, and every member of the community shares, with all others, the beneficial enjoyment of the protective service which the fire patrol thus renders, and every owner of property is subject to the exercise of this right to enter upon his property in the cases above specified. These provisions fairly bring the act in question, at least so far as the sections which bear upon the cause of action are concerned, within the class of public statutes.

The difficulty the defendant's counsel seems to find in determining who are the other organizations and agencies referred to in section 7 of the act as "hereinbefore mentioned" is solved, I think, by the first sentence of the section, which mentions, among those who are entitled to attend the plaintiff's biennial meeting, incorporated insurance companies or associations doing business in the city of New York, whose officers or agents are *not* members of the plaintiff corporation. It is the evident intention of the act that the right to participate in the meeting, which is to determine whether the fire patrol shall be continued, shall be enjoyed by all who are subject to assessment for its maintenance. It would also seem clear that the word "association," as used in the section, imports an unincorporated body, because we find in the following



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section the same word evidently used to denote something different from a corporation.

Upon the question of the constitutionality of the act, I am of the opinion that the objection raised is hardly tenable. The Legislature has the power to regulate the insurance business. In fact it has done so by adopting a voluminous law upon the subject and providing for State supervision. The provision, in the act under discussion, for an assessment upon those engaged in the business in this city for the support of fire patrol, in proportion to premiums received, may well be sustained in view of the public nature of the service rendered and the great and peculiar benefit received from it by insurers whose losses upon policies are largely reduced by its efficiency. At all events I should not undertake at Special Term to pronounce the act to be unconstitutional without much plainer evidence of the fact than I find to exist.

The objection that the action cannot be maintained in the form in which it has been brought, because the Metropolitan Lloyds has neither president nor treasurer, is not tenable. It may be true, as the complaint shows, that it has no such officer *eo nomine*, but the allegation that Beecher & Co. perform "corresponding functions of a treasurer" sufficiently designates them as such, although they may not bear the title. Upon the whole, I think that the complaint is sustainable, and that the demurrer should be overruled, with leave to the defendant to answer within twenty days on payment of costs.

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In the Matter of Anthony W. Dimock.

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IN THE MATTER OF THE APPLICATION OF  
ANTHONY W. DIMOCK, AN INSOLVENT  
DEBTOR, FOR HIS DISCHARGE FROM  
HIS DEBTS.

ULSTER COUNTY COURT, MARCH, 1895.

§§ 2149 to 2187 inclusive.

*Application for discharge from debts under the two-thirds act—petitioner's residence in the county must be proved—also legality of alleged claims and consents of creditors.*

In all cases where the statute prescribes residence as a qualification for the enjoyment of a privilege or the exercise of a franchise, the word residence is equivalent to the place of domicile of the person who claims its benefit.

"In a legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning," and to effect a change, there must not only be a change of residence, but an intention to abandon the former domicile accompanied by an actual abandonment, with the intention not to return, and the taking up of a residence in another place, with the intention of staying there permanently.

An application made by a person under the insolvent debtors' act, sections 2149 to 2187 of the Code of Civil Procedure, for a discharge from his debts, must be made to the County Court of the county in which he resides, and his residence in that county must be proved; and where the evidence shows him to be a resident of another county instead, the application will be denied.

Although the act providing for the discharge of an insolvent debtor is a remedial statute, intended to accomplish a beneficent result, and therefore liberally construed, and although much power and discretion is vested in the Court, to which the application is addressed, still such discretion is judicial and not arbitrary, and it is an abuse, not an exercise of judicial discretion, to permit the provisions of even a remedial statute to be enlarged to such

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an extent as to bring within its terms a class of cases expressly excluded by the Legislature.

The petitioner for discharge must also show to the satisfaction of the Court, that creditors having debts owing them in good faith amounting to not less than two-thirds of all the debts owing by him to creditors in this country, shall, at the time of the filing of the petition, consent to his discharge, and if this fact does not sufficiently appear, the application will be denied.

(Decided March, 1895.)

Application by petitioner for discharge from his debts under the Two-thirds act (sections 2149 to 2187 of the Code).

The facts are stated in the opinion.

*Bradbury C. Chetwood, Mr. English and Millard F. Powers*, for the insolvent and the application.

*Turner, McClure & Rolston and Frederick Geller*, for the Farmers' Loan and Trust Company.

*Butler, Stillman & Hubbard and Arthur H. Van Brunt*, for the United States National Bank ; non-consenting creditors and opposed.

CLEARWATER, Co. J.—The petitioner, an insolvent debtor, seeks to be discharged from his debts under the provisions of Article I, Title I of Chapter VII of the Code of Civil Procedure, section 2149 to 2187 inclusive, commonly known as the Two-thirds act.

The discharge is opposed by creditors whose claims aggregate \$138,427.31 upon the grounds, among others :

First. That the insolvent at the time of presenting his petition was not a resident of the County of Ulster.

Second. That he did not at the time of filing his petition present consents executed by creditors as required by the act.

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Third. That he has been guilty of such misconduct relative to matters involved as should bar his discharge.

Fourth. That the petition and the proceedings are not in accord with the provisions of the statute, in that they are faulty both in substance and in form.

In support of this last contention, so many objections have been urged that their mere enumeration would occupy almost as much space as is ordinarily devoted to an opinion, and while it must be conceded that in some respects the proceedings upon the part of the petitioner are slightly original and inartificial, the view taken of the merits of the application makes it unnecessary to discuss them at length.

It appears from the evidence, which is voluminous if not exhaustive, that the petitioner, in the year 1884, was the president of the Bankers & Merchants' Telegraph Company, a corporation having its principal place of business in the City of New York. That he was also interested in so-called financial operations in Wall street, and was largely indebted to various banks, bankers, brokers and trust companies. That on the 15th day of May of that year he failed, and executed a general assignment for the benefit of his creditors, his indebtedness at that time being stated at \$2,633,895.37, and his assets of the nominal value of \$3,848,932.06. This assignment was subsequently adjudged to be void, and was set aside in an action brought for that purpose, it appearing that the result, if not the purpose, of that suit was to vest the title to such assets as he did have in his wife. It is claimed here that the assignment and the action were so collusive and tainted with fraud as to bar his discharge in this proceeding.

The statute provides that the application for the discharge of an insolvent debtor must be addressed to

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the County Court of the county in which the insolvent resides (*Code Civ. Pro.*, § 2150). That the insolvent must annex to his petition written instruments executed by his creditors residing within the United States having debts owing them in good faith, then or thereafter to become due, which amount to not less than two-thirds of all the debts owing by him to creditors residing within the United States (*Ibid.*, § 2152), and that the Court shall grant the discharge when it satisfactorily appears among the other things required by the statute that the petitioner is justly and truly indebted to the consenting creditors in sums which amount in the aggregate to two-thirds of all his debts, as hereinbefore specified (*Ibid.* § 2174).

It would seem, therefore, as conditions precedent to the petitioner's discharge, that he must affirmatively establish—

1st. That at the time of presenting his petition he was a resident of the County of Ulster.

2d. That creditors having debts owing them in good faith amounting to not less than two-thirds of all the debts owing by him to creditors in this country shall, at the time of the filing of the petition, consent to his discharge.

3d. That he is justly and truly indebted to the consenting creditors in a sum which amounts in the aggregate to two-thirds of all his debts.

It is claimed by the insolvent that his debts now amount to \$2,442,073.84; that creditors whose claims aggregate \$2,303,646.53 consent to his discharge, and that he has assets to the amount of \$187.62 applicable to the payment of this indebtedness.

The non-consenting creditors, upon the other hand, claim that the true amount of the insolvent's indebtedness exceeds three millions of dollars, and

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that the consenting creditors do not truthfully represent within many hundreds of thousands of dollars two-thirds of that sum.

As to the first point, it is well settled that in all cases where the statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, the word residence is equivalent to the place of domicile of the person who claims its benefit (*People v. Platt*, 117 N. Y. 167; *Silvey v. Lindsay*, 107 N. Y. 55, 61; *Jacobs on Domicile*, sections 72, 75, 86, 92, 114, 125, 136, 181, 310, 393, 396, 435; *De Bonneval v. De Bonneval*, 1 *Curteis*, 856, 864; *Joop v. Wood*, 2 *De G. J. & S.* 616; *Hannon v. Grizzard*, 89 N. C. 115, 120; *State v. Aldrich*, 14 *R. I.* 171; *Roberts v. Cannon*, 4 *Dev. & B.* 256, 269).

Domicile is succinctly and accurately defined by a scholarly writer as follows: "In a legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." (*Story, Conflict of Laws*, chapter 3, page 51, edition of 1846.) See also *Burrill's Law Dictionary*, the *American and English Encyclopædia of Law* (vol. 5, page 657), and the *Standard*, *Worcester's*, *Webster's* and *Stornmonth's* dictionaries.

Whatever be the doctrine of the civil law it has uniformly been held to be the rule of the common law, that that place is a man's domicile which is his home. That it will be presumed so to continue until a new one is acquired. That it is in no way affected by a temporary residence elsewhere, and that to effect a change there must not only be a change of residence, but an intention to abandon the former domicile accompanied by an actual abandonment, with the intention not to return, and the taking up of a residence in

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another place, with the intention of staying there permanently. *Depuy v. Wurts*, (53 *N. Y.* 556), *Frost v. Briskin* (19 *Wend.* 11); *Van Hoffman v. Ward* (4 *Red.* 244); *Bartlett v. New York* (5 *Sandf.* 444); *Graham v. Public Administrator* (4 *Brad.* 127); *De Meli v. De Meli* (67 *How.* 20), apparently settle the rule in this State, which, however, is not different from that held elsewhere, where the common law prevails (*Lauderdale Peerage L. R.*, 10 *App. Cases*, 692, 758; *Gillis v. Gillis*, *Irish Rep.* 8 [*Eq.*], 597; *Capdeville v. Capdeville*, 21 *L. T. N. S.*, 660; *Hodgson v. De Beauchesne*, 12 *Moore P. C. C.* 285; *Munro v. Munro*, 7 *Clark & F.*, 842).

Did then, within this rule, the petitioner have a legal residence in the county of Ulster at the time of filing his petition in this Court on the 7th day of August, 1893?

It appears from the evidence that at that time and for some years he had been a member of the Peekamose Fishing Club, an organization then composed of four members, owning many acres of mountain land, and having an extensive fishing preserve on the head waters of the Rondout, at the foot of the Peekamose Mountain, in a wild and unfrequented part of the Catskill Mountains, but within the territorial limits of the town of Denning, in this county. Its purpose is the protection, increase and capture of brook trout, and the promotion of social intercourse and rational amusement among its members. There is upon the grounds a clubhouse, divided into nine bedrooms, a dining room and a kitchen, having a frontage of thirty-eight and a depth of twenty-five feet, with two small extensions in the rear. It is constructed in part of lumber, in part logs, and is principally used during the summer months. The constitution and by-laws of

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*In the Matter of Anthony W. Dimock.*

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the club provide that a room in the clubhouse shall be assigned to each member, and that the privilege of the clubhouse may be extended to the families of members.

The petitioner's family consists of his wife, her mother, a daughter, a son, and himself. The other members of the club, with their families, visit the clubhouse from time to time and are assigned rooms as provided by the by-laws. All the members when at the clubhouse have their food cooked in common and eat together in the club dining-room, being waited upon by such servants as the members take with them to the mountains, there being no clubhouse servants.

The clubhouse is some distance removed from any of the mountain settlements, in fact from any human habitation. The nearest hamlet on the east being Watson's Hollow, four or five miles distant, and there being a single mountain cabin at Bull Run on the Rondout, about four miles to the westward, while the wilderness of the southwestern Catskills stretches in unbroken solitude for miles to the north and south. There is, of course, no church, no schools, no neighbors and no society other than that consisting of the members of the club, their families and guests.

The petitioner and his family for some years have spent the summer, and occasionally the late spring and early autumn, at this place, with such other members of the club and their families as went there. The residue of the year has been passed at Elizabeth, in the State of New Jersey, where they occupy a house, the title to which is vested in the petitioner's wife.

This house is about forty feet in front, is two stories in height, with the ordinary mansard roof, and has the usual rooms of a city dwelling of that class.



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It is occupied solely by the petitioner, his family and their servants, and is fully furnished with the furniture owned by the petitioner during the years of affluence which preceded his failure. For some years prior to living in this house the petitioner and his family occupied another dwelling at Elizabeth, of much the same character, the value of which can to some extent be estimated from the fact that the Equitable Life Assurance Society of New York loaned twenty thousand dollars upon it. The relatives of the petitioner and of his wife live at Elizabeth, and his wife and children are connected with a church and Sunday-school, and some of the social organizations of that city. It is to Elizabeth they have always annually returned when the approach of winter deprives the atmosphere of the Catskills of that balsamic softness for which the region is noted.

As the petitioner swore in support of this application that he had been a resident of Ulster County for the last fifteen years, it is claimed by the learned counsel who represent him that the Court is precluded by that testimony from finding otherwise. This contention can, however, hardly be said to be well founded, in view of the fact that he is an interested party, it having always been held since the passage of the act permitting parties in interest to testify in their own behalf, that even though their testimony be contradicted by other witnesses, yet their interest in the event creates such a question as to credibility as to justify the Court in disregarding it if all the evidence in the case requires its rejection (*Govin v. De Miranda*, 140 N. Y. 662-666; *The Canajoharie Nat'l Bank v. Diefendorf*, 123 N. Y. 191-200; *Joy v. Diefendorf*, 103 N. Y. 6-9; *Honegger v. Wellstein, et al.*, 94 N. Y. 252-261; *Wahlfahart v. Beckert*, 92 N. Y. 490-497;

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In the Matter of Anthony W. Dimock.

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Elwood *v.* Western U. T. Co., 45 *N. Y.* 549 ; Goldsmith *v.* Coverly, 75 *Hun.* 48).

The strength of the insolvent's testimony is, however, somewhat lessened by the following admitted facts :

In the general assignment executed by him in 1884 he states that he is a resident of the City of New York. In the action brought to set aside that assignment it was by his procurement alleged and adjudged that in December, 1885, he was a resident of that city. In a deed executed by him at Elizabeth, in October, 1892, to Josiah W. Wentworth, one of his fellow members in the Peekamose Fishing Club, and conveying an interest in lands in Ulster County, he describes himself as being a resident of Elizabeth ; in a deed executed by his procurement in February, 1893, to his wife, she is described as residing in Elizabeth. During the last ten years when away from home and registering at hotels he has registered his residence as at Elizabeth, never at Peekamose. In the testimony given by him in an action brought by one of the contesting creditors, he testified that for the last ten years he has resided in the cities of New York and Elizabeth. And he testifies that in the event of this application being granted, it is his intention once more to engage in business in Wall street, in the City of New York, which is but a few miles distant from Elizabeth.

Under all these undisputed facts it would hardly seem that even within the most elastic construction which the Court is justified in giving to the terms "residence" and "domicile," that the petitioner can legally be said to have been a resident of Ulster County at the time of filing this petition.

It is quite true that the Two-thirds act is a remedial statute intended to accomplish a beneficent result and

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should therefore be liberally construed. Also it is true that much power and discretion is vested in the Court to which this application is addressed. But all discretion vested in Courts and Judges is judicial and not arbitrary, and it is an abuse, not an exercise of judicial discretion, to permit the provisions of even a remedial statute to be enlarged to such an extent as to bring within its terms a class of cases expressly excluded by the Legislature. Such a construction in the end produces results more harmful in their effect than the fancied wrong it improperly seeks to remedy.

This conclusion renders an extended discussion of the remaining questions involved unnecessary, although it may not be amiss briefly to say that the evidence falls far short of satisfying me that the petitioner has either produced the consents of creditors required by the statute, or that he is justly and truly indebted to the creditors who have consented to the amount he and they claim.

Upon the contrary, I am at a loss to understand upon what view of the law an indebtedness to John B. Yale, one of such creditors, to the amount of \$331,-815.62, can justly and truly be said to exist, in view of Mr. Yale's own testimony as to the facts out of which it is claimed to have arisen.

The claim of John R. Hageman, another consenting creditor to the amount of \$171,212.78, does not appear upon the schedule of the insolvent's creditors filed with his general assignment in 1884, and the debt now claimed to be due is also claimed to have matured before that time. While this omission could not, of course, prejudice the creditor, who was not consulted regarding the preparation of those schedules and whose testimony on this proceeding was, I think, frankly and fairly given, yet its omission at that time

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is some evidence as to the view then taken by the insolvent of the transactions out of which it is now claimed the indebtedness arose. It would seem, also, that there were included in those schedules claims aggregating considerably over one million dollars not included in the schedules of the insolvent's creditors now filed.

It is urged that of those claims upwards of \$777,000 have been absolutely and upwards of \$247,000 conditionally released, but it is doubtful whether the authority to make the release executed by Russell Sage, the Third National Bank of the City of New York, and Hague & Harris for claims aggregating about \$120,000 is sufficiently proven for the purpose of this application. And it is by no means clear that the claim of the Quebec Bank for \$48,817 is not within the statute.

In fact, the marshalling of the alleged claims of the consenting creditors, the reasons assigned for the failure to include claims admitted once to exist and never paid, the insistence that the statute of limitations bars the consideration of claims of creditors to the amount of hundreds of thousands of dollars who have not been afforded an opportunity to be heard in their own behalf, and an equally strenuous insistence that claims of friendly creditors standing upon precisely the same legal footing are not barred by that statute, is an attitude hardly calculated to produce an unduly favorable impression upon the mind of the Court.

It is unnecessary to discuss the allegation of collusion and fraudulent intent to which much attention has been devoted by counsel upon both sides, as, upon the whole case, I am of the opinion that the decree prayed for should be refused, and an order may be

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entered denying the application and dismissing the proceedings upon the merits, with costs to the opposing creditors and against the petitioner.

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WALTER S. DRAKE v. WEINMAN & CO.

NEW YORK COURT OF COMMON PLEAS, GENERAL  
TERM, APRIL, 1895.

§§ 803-809 inclusive, 872.

*Examination of officer of corporation defendant before trial—production of books and accounts as an adjunct to the oral examination.*

To obtain an order for examination before trial, the statute does not require that the action should be pending. The order may be granted where the action "is expected to be brought."

It is well settled upon authority, that an inspection and discovery, with the privilege of copying, by an adverse party, can only be had under and in the manner provided by sections 803-809 of the Code of Civil Procedure.

It is equally well settled that in a proper case a witness may under section 872 of the Code, subdivision 7, be required to produce books and papers as an adjunct to his oral examination, and to refer to them for the purpose of making his examination more effective.

Where a fiduciary relation or the relation of principal and agent exists and the facts are peculiarly within the knowledge of the one sought to be examined, his duty is one of full disclosure, and the technical rules applicable to such orders are relaxed.

In an action brought to recover alleged profits from a broker, upon an application being made for examination of defendant before trial, where an incomplete account has been furnished by defendant, and an offer made in bad faith for the examination of defendant's books—*Held*, that the plaintiff should not be com-

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pelled to accept an inspection in place of the examination of witnesses in connection with the books, and an order granted for such examination will not be vacated on that ground.

(Decided April, 1895.)

Appeal by the defendant corporation from an order of the Special Term denying its motion to vacate an order for the examination before trial of certain of its officers.

The facts so far as they are material are stated in the opinion.

*Howe & Hummel*, for appellant.

*L. Karge*, for respondent.

GIEGERICH, J.—The defendant is a corporation organized under the laws of the State of New Jersey, doing business in the City of New York, and claims its business to be “the purchase and sale of stocks and bonds.” The plaintiff resides at Brockton, in this state, and as stated in his affidavits to procure the examination of certain of the defendant’s officers before trial, he in substance alleges that prior to February 27th, 1894, he received from the defendant company a circular or prospectus setting forth the alleged advantages to be derived by the investment of money in what was therein styled as their “Special R.R. Stock Syndicate,” for dealing in stocks, it being therein stated that said alleged syndicate had been operated in the past by the defendant company at a great profit; that still greater profits were to be expected in the future from investment therein according to the plan referred to in such prospectus; that the defendant company was a broker, engaged in buying and selling stocks, grain, &c., and had unusual facilities for dealing in the stocks embraced in said alleged

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“Special R.R. Stock Syndicate”; that they would use their best endeavors as agents and brokers for the benefit of persons intrusting them with money for investment therein, and would render, when desired, full accounts of all deals or transactions made; that the plaintiff, believing their representations to be true and relying thereon, at various times between February 25th and July 20th, 1894, sent to and deposited with the defendant company sums of money amounting in the aggregate to \$2,800, to be used and invested by it as his agent and broker in the alleged “Special R.R. Stock Syndicate.” That the plaintiff during the course of his dealings with the defendant company received from it \$1,124.50, which he was informed were the profits from his investments; and on or about the 21st day of October, 1894, he received from the defendant company its check for \$420, which was stated to be the balance of the moneys deposited by him after deducting alleged losses; that plaintiff has requested the defendant company to give him an account of the moneys so deposited for investment and to account therefor, but it has refused to do so, except of a general statement of account; that the defendant company has refused to allow plaintiff to examine its books, papers or accounts supposed and alleged to contain an account of the transactions or dealings had by it as his agent and broker; that from such information as he has been able to obtain, he believes and on information and belief alleges that such general statement of account so rendered to him was false and untrue, and did not correctly state the transactions had by the defendant company for the plaintiff (if any transactions were in fact actually made or had), or that no transactions were really made or had by the defendant company, as the agents

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and brokers of the plaintiff, and with his money; but the statement so rendered was one simply of pretended purchases and sales, no purchases and sales being in fact ever made, and the whole consummated in pursuance of a cunningly devised scheme to delude and defraud plaintiff and deprive him of his money; that the defendant company, if it actually did buy or sell any stock for the plaintiff, failed to use its best endeavors in his behalf, but acted solely for its own interests.

The plaintiff seeks an examination of the officers of the defendant company and production of its books, papers and accounts, because, as plaintiff swears he does not know and has no means of ascertaining the manner in which his said money was invested by the defendant company (if it was invested at all), or how the same was, in fact, used, the knowledge thereof being entirely within its own possession, and presumably contained in its books, papers and accounts; and that it is material and necessary that plaintiff should know the facts and particulars in regard to said transactions in order to properly frame his complaint herein.

Upon the foregoing facts an order was granted, the material portions of which are as follows: "It is ordered that said Charles Landsberg, Mark Bloomingdale and Charles Weinman aforesaid be examined and their deposition taken pursuant to sections 870, 871, 872 and 873, of the Code of Civil Procedure, and that for such purpose they attended before \* \* \* (naming referee and the time and place of examination), and that they and each of them then and there produce for examination and inspection at the time and place aforesaid the books, papers and accounts of the said defendant company showing all the dealings



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or transactions had or made by it as the agent or broker of said plaintiff," &c.

A motion was made to vacate the order based upon five grounds, which will be stated and considered *seriatim*.

1. That the action had not been commenced and was not pending at the time the order was obtained and served.

To this it need only be said that the statute does not require that the action should be pending ; on the contrary, section 872 of the Code of Civil Procedure expressly provides for cases where "an action is not pending, but is expected to be brought." The case of *Brandon M'fg Co. v. Pettingill* (2 *Abb. N. C.*, 162), relied upon by the appellant, was decided under section 391 of the old Code, which contained no equivalent of the language just quoted from the present section 872.

2. That the order for examination and production of defendant's books could only be made on notice to the defendant and could not be allowed *ex parte*.

This objection rests upon a misapprehension of the meaning of the order. Subdivision 7 of section 872 makes provision in cases where, as here, the party is a corporation, and the witnesses to be examined are officers for the production of books and papers, "as the contents of which an examination or inspection is desired." This means an examination and inspection by the witnesses upon their oral examination to enable them to answer proper inquiries as upon a trial. It is well settled upon authority that an inspection and discovery, with the privilege of copying, by an adverse party, can only be had under and in the manner provided by sections 803-809 of the Code (*Dick v. Phillips*, 41 *Hun*, 603, 5 *State Rep.* 228, 25 *Weekly Dig.* 25 ; *McCuffin v. Dinsmore*, 4 *Abb. N. C.* 241 ;

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Black v. Curry, 1 *Civ. Pro. Rep.* 193 ; Levey v. N. Y. C. & H. R.R. Co., 53 *Super. Ct. Rep.* 267), and it is equally well settled that in a proper case a witness may, under section 872, subdivision 7, be required to produce books and papers as an adjunct to his oral examination, and to refer to them for the purpose of making his examination more effective (Talbot v. Doran & Wright Co., 16 *Daly*, 174, 18 *Civ. Pro. Rep.* 18, 30 *St. Rep.* 558, 9 *N. Y. Suppl.* 478 ; Levey v. N. Y. C. & H. R. R.R. Co., *supra* ; Chaffey v. Equitable Reserve Fund Life Asso'n, 56 *Super. Ct. Rep.* 267, 18 *St. Rep.* 960, 2 *N. Y. Suppl.* 481 ; Bloom v. Pond's Extract Co. 27 *Abb. N. C.* 366, 18 *N. Y. Suppl.* 179 ; Fenton v. Dempsey, 10 *St. Rep.* 733 ; Black v. Curry, *supra*).\*

3. That the affidavit alleged the plaintiff's cause of action to be an accounting, and the facts shown clearly proved that the plaintiff was in possession of ample material to prepare a complaint.

Conceding for the sake of argument that all this is so, we must nevertheless sustain the order. Where a fiduciary relation or the relation of principal and agent exists and the facts are peculiarly within the

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\* It seems that an examination of the adverse party and a discovery and inspection of his books and papers, cannot be had in one proceeding. (Havemeyer v. Ingersoll, 12 *Abb. N. S.* 801.)

Where it appeared that transactions had between plaintiff and defendant, a corporation, were entered upon the books of the latter under numbers, not names, and that an inspection of the books would not avail plaintiff without an examination of defendant's officers—*Held*, that defendant could be required to produce the books on the examination of an officer before trial, under section 872, subd. 7, and that the practice under sections 803, *et seq.*, did not apply. (Talbot v. Doran & W. Co. 18 *Civ. Proc. R.* 804.)

The right to an inspection to discover evidence is not to be confounded with the production of books, etc., as evidence on the trial or examination of party before trial. (Lefferts v. Brampton, 24 *How. Pr.* 257.)

knowledge of the one sought to be examined, his duty is one of full disclosure, and the technical rules applicable to such orders are relaxed (*Carter v. Good*, 57 *Hun*, 116; *Miller v. Kent*, 59 *How. Pr.* 322, 10 *Weekly Dig.* 361; *Talbot v. Doran & Wright Co.*, *supra*; *Fatman v. Fatman*, 22 *Civ. Pro. Rep.* 149, 45 *St. Rep.* 859, 18 *N. Y. Suppl.* 847; *Green v. Cory*, 81 *Hun*, 496, 32 *St. Rep.* 501, 10 *N. Y. Suppl.* 647).

As was said by Chief Judge Daly in *Talbot v. Doran & Wright Co.* (*supra*), a case which was singularly like the present one in many of its features, "The principal has a right to know the facts in advance of the trial in order to investigate such transactions and make preparations for the trial."

4. The material allegations of the affidavits were all on information and belief, neither the source of the information nor the grounds of the belief being stated.

Here again the principle of the cases cited is applicable and we cannot do better than quote once more from the case of *Talbot v. Doran & Wright Co.* (*supra*): "The objections that the allegations of the plaintiff's affidavits are upon information and belief, and that there is a mere suspicion or conjecture as a basis for the examination is not a sound ground under the circumstances of this case. The plaintiff is entitled to the information he seeks from his brokers, and is not bound to make out a case against them as a condition of the examination."

5. On the merits, as shown by the defendant's affidavits, no examination should be allowed.

Bloomingtondale in his affidavit, says: "The account which I annex and make part hereof is a true and just statement and furnishes all the information that the plaintiff could possibly obtain upon an examination." The account referred to is a most meagre

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one, taken, so it is said, in the subsequent affidavit of Weinman, from the ledger, and does not disclose the names of the persons with whom the alleged transactions were had. It was, therefore, useless as affording the plaintiff a clue by which he could follow up and investigate the alleged purchases which were claimed to have resulted in such disastrous losses. After Bloomingdale's denial that any further information could be had upon an examination, and after the counter-affidavits of stock brokers that reputable men in their business keep books which contain the names of persons to whom stock was sold and of whom it was bought, and other details of each transaction, Weinman put in his said affidavit, admitting that the "names do not appear in the stock purchase and sales books, \* \* \* and on original contracts in the possession of the defendant," and then proceeds to make tardy profession of his willingness to permit an inspection of defendant's place of business.

The language of Judge Davis, in *Miller v. Kent*, *supra*, seems just in point: "A commission merchant or broker has no right to conceal from his customer any portion of his business and dealings in relation to the property alleged to have been bought and sold; and where he withholds the fullest information on that subject, the right to examine before trial in an action brought to recover alleged profits, or to adjust the unsettled accounts, should be fully accorded." We are not at all satisfied with the good faith of the alleged proffers of the examination of the defendant's books, etc. The disingenuousness of the attempt thus to defeat the examination of defendant as a witness must have struck the Court below as it does this Court.

Under all the circumstances we do not think that the plaintiff should be compelled to accept an in-

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spection in place of the examination of the witnesses in connection with the books. For obvious reasons, the one remedy might not prove as effective as the other.

For these reasons the order appealed from should be affirmed, with costs.

DALY, C. J., and BOOKSTAVEN, J., concurred.

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**KNAPP v. VALENTINE**

**SUPREME COURT, CIRCUIT, NEW YORK COUNTY,  
APRIL, 1895.**

**§ 1913.**

*Action upon a judgment—between the original parties—leave of the Court must be obtained.*

Under section 1913 of the Code of Civil Procedure, providing that an action upon a judgment for a sum of money between the original parties to the judgment cannot be maintained without an order of the Court granting leave to do so, *Held*, that such prohibition is limited to the original parties, and that where a title to the judgment has been assigned or transferred, it is not necessary for the assignee or transferee, before bringing his action, to obtain an order of the Court permitting him to do so. Where the defendant omits to plead the failure of the plaintiff to obtain leave to sue upon the judgment, the objection cannot be raised for the first time at the trial.

*(Decided April 1, 1895.)*

**Action on a judgment by the assignee thereof.**

*Thornall & Pierce*, for the plaintiff.

*I. Newton Williams*, for the defendant.

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*Knapp v. Valentine.*

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LAWRENCE, J.—On the 9th day of June, 1876, a judgment was recovered in this Court in favor of Edward M. Voorhees against Andrew J. Kerwin, Henry Valentine and others, barring and foreclosing the defendants from all right, title and interest in and to certain premises described in the complaint, and decreeing that said premises be sold, and directing the defendants, Kerwin, Von Schoening and Valentine, to pay any deficiency in the amount found due to the plaintiff in said action. Henry Valentine who was the defendant in that action is the defendant herein. Upon the sale there was a deficiency amounting to \$5,290.84. The referee named in the said judgment thereafter filed his report of sale, which said report was by an order of this Court confirmed on the 27th of July, 1876, and the clerk of the City and County of New York was directed to enter a judgment for such deficiency in favor of said Voorhees against the defendants, which was accordingly done. The said judgment was entered severally against each of said defendants, and no part thereof has been paid. Before the commencement of this action, the said judgment was duly assigned to the plaintiff herein. All these facts are admitted, but it is claimed that as the complaint does not aver that an application was made to the Court for leave to bring the action, no cause of action is stated in the complaint. The defendant relies upon section 1913 of the Code of Civil Procedure, in support of this position. It was frequently held, under section 71 of the old Code of Procedure, from which section 1913 of the present Code is taken, that the prohibition of section 71 was limited to the original parties, and that where a title to the judgment had been assigned or transferred, it was not necessary for the assignee or transferee,

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before bringing his action, to obtain an order of the Court permitting him to do so (see *Smith v. Britton*, 45 *How. P. R.* p. 428, per Van Brunt, J.; *Wheeler v. Dakin*, 12 *P. R.* p. 537). That the rule has not been altered by section 1913 of the Code of Civil Procedure has been decided in several cases (see *Hedges v. Conger*, 10 *State Rep.* p. 42 [General Term, First Dept.], opinion by Daniels, J.; *Carpenter v. Butler*, 29 *Hun*, p. 251 [General Term, Second Dept.], opinions by Dykman and Cullen, JJ.; see also *Freeman v. Dutcher*, 15 *Abb. N. C.* p. 431, and cases cited by Boches, J., at p. 433). Furthermore, as the defendant omitted to plead the failure of the plaintiff to obtain leave to sue upon the judgment, the objection cannot be raised for the first time at the trial (see *German Savings Bank v. Carrington*, 14 *Weekly Dig.*, p. 475; this case was affirmed by the Court of Appeals, 85 *N. Y.*, p. 632). The case of *Farish v. Austin* (25 *Hun*, p. 430), was decided by the same General Term in this Department as decided the *German Savings Bank v. Carrington*, and if in conflict with the decision in that case, the latter must control, inasmuch as it is not only later in point of time, but has also been affirmed by the Court of Appeals. I am of the opinion, therefore, that the plaintiff is entitled to judgment for the sum of \$5,290.84 with interest from the 21st of July, 1876, together with costs and an allowance of \$150.

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Fairbank v. Blaut.

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N. K. FAIRBANK CO. v. BLAUT, *et al.*

SUPREME COURT, SPECIAL TERM, N. Y. COUNTY,  
APRIL, 1895.

§ 500.

*Answer—when the allegations thereof must be made more definite and certain.*

The provision of the Code of Civil Procedure (section 500) that the answer must contain "a denial of each material allegation of the complaint controverted by the defendant," does not mean that the answer should be complete in itself, as a statement of the issues raised without reference to any other pleading. In the determination of what issues are raised, the complaint and answer are considered together.

An allegation, however, in the answer, that "said defendant denies upon information and belief, in part, and in part of her own knowledge, the allegations contained in the 6th, 7th, 8th and 9th paragraphs of the said amended complaint" must be made more definite and certain. The plaintiff is entitled to know which allegations are denied absolutely, and which are denied only upon information and belief.

(Decided April, 1895.)

Motion by plaintiff to make the several answers of six of the defendants more definite and certain.

The facts are stated in the opinion.

*Sullivan & Cromwell*, for the motion.

*Jacob Fromme*, opposed.

BEEKMAN, J.—This is a motion to make the several answers of six of the defendants more definite and certain. The complaint contains allegations



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stated in separate paragraphs, each paragraph being identified by a Roman numeral in consecutive order, beginning with "I" and ending with "IX." The defendants answer separately. The denials contained in the answer are in the following form: "I. Said defendant denies that she has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 2d, 3d, 4th and 5th of said amended complaint." This may be taken as a fair specimen of the form of denial to which the plaintiff objects. Some of the answers also contain the following form of denial: "Said defendant denies upon information and belief in part, and in part of her own knowledge, the allegations contained in the 6th, 7th, 8th and 9th paragraphs of said amended complaint." The counsel for the plaintiff claims that this form of pleading is not in conformity with section 500 of the Code of Civil Procedure, and insists that the defendants should have repeated in the body of their answers the allegation of the complaint upon which the denial is intended to operate. As an authority for the motion, I am referred to *Baylis v. Stimson* (110 N. Y. 621). In that case the denial was in the following form: "The defendant further denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the following portions of the complaint, viz., the whole of the paragraph beginning with the words 'And the plaintiff,' in folio 11. The last five lines of the paragraph ending in folio 15. The last three lines of folio 19, and the first six lines of folio 20. The whole of the paragraph beginning in folio 23 with the words 'And the plaintiff.' The following sentence in folio 26, 'And that he thereby became liable for the costs and expenses of such defense to the sum of \$250.' The last

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eight lines of folio 31, and folios 32 and 33." The question was not before the Court for decision, and the statements contained in the opinion upon the subject are entirely *obiter*. The Court says, referring to the answer above quoted (p. 623): "It is thus inartificial and troublesome, and not in accordance with any rule of pleading at common law or under the Code. It is, however, careless, no doubt easy for the pleader, but the labor of dissection and discovery as to its meaning is thrown upon the opposite counsel and the Court. It belongs to neither. The answer should disclose the defense, whether it be by denial or new matter, without reference to any other pleading; it should be complete in itself and require neither amplification nor patching from fragments of the complaint. The Code means nothing less when it enacts (section 500) that the answer must contain 'a denial of each material allegation of the complaint controverted by the defendant,' and what allegations are thus controverted should appear on the face of the answer. The plaintiff's attorney should not be required to look beyond that pleading for such information, nor should the Court be required to count lines and measure paragraphs to discover the matters put in issue.\* We think, however, the answer has been properly construed and applied; at least the finding of the referee is clear and decisive." I do not think that these remarks should be extended to apply to a pleading other than one quite similar to that which was before the Court. The embarrassment in that case which provoked this criticism of the Court of Appeals grew out of the fact that the reference was to folios of the complaint which were quite different from the folios of

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\* See also to the same effect, *Avery v. N. Y. C. & H. R.R. Co.*, 24 *State Rep.* 918.

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the same pleading as it appeared upon the record on appeal. In the present case, however, the references in the answer to the allegations of the complaint are by paragraph numbers, which form a part of the complaint itself, and that fact will always appear, in whatever shape the pleading may be presented to the Court. In the present case there can be absolutely no doubt as to what allegations are denied ; a simple inspection of the complaint itself will exhibit the fact. The claim that the plaintiff's attorney should not be required to look beyond the answer for information as to the allegations which are controverted goes altogether too far, if it is intended to apply to forms of denial similar to those under consideration. If such a construction is to be adopted, then an answer which in terms denies each and every allegation contained in the complaint would be also open to criticism, because a reference to the complaint would be necessary in order to determine what those allegations were. The common practice of the profession best determines the question of the convenience of attorneys which is referred to in the case above mentioned, as one of the reasons for discouraging this form of pleading. It undoubtedly is the practice, where the defense is in part a denial, to deny by reference to the particular paragraph. The advantage of it is obvious. It avoids the repetition of voluminous statements which would largely increase the size of the pleading, and thus subject attorneys and Court to a useless expenditure of time in again traveling over the allegations of the complaint in the answer. It would also increase the bulk of the record, and materially add to the cost of printing where appeals are taken. Furthermore, if the paragraph intended to be denied is to be set forth in the answer, it would involve a discussion as to

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whether the denial contained a negative pregnant, unless the pleader carefully denied each fact which the allegation contains, or which might be inferred from it. The effect of the application of such a rule in a complicated equity case where the allegations are voluminous, would be simply intolerable to attorneys and judges. The answer is a pleading which raises an issue. What that issue is must always be determined by reading the complaint and the answer together; and I fail to see, under such a form of pleading as has been adopted by the defendants in this case, how there can be the slightest difficulty or inconvenience in determining what the issue is. In fact it may safely be claimed that the issue can be more quickly determined than if the defendant had undertaken to weave the allegations of the complaint into his forms of denial in his answer. I have examined the records of some of the cases which were before the Court of Appeals at the time the case of *Baylis v. Stimson* was considered, and find that in the majority of them allegations of the complaint were denied in precisely the form found in the case before me, by a reference to the paragraph numbers of the complaint. I do not think that the Court intended to include such forms of denial within its strictures. The criticism which it passed upon the pleading in that case was well deserved, but entirely inapplicable to the case before me. I am satisfied that the forms of denial which have been adopted in this case are quite in accordance with the requirements of section 500 of the Code of Civil Procedure, and are free from just criticism. I expect, however, from what I have said those allegations contained in the answers before me which are in the following form: "Said defendant denies upon information and belief in part, and in part

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of her own knowledge, the allegations contained in the 6th, 7th, 8th and 9th paragraphs of the said amended complaint." The plaintiff is entitled to know which allegations are denied absolutely and which are denied only upon information and belief.\* As the denial stands, it is utterly impossible to determine this question, and, furthermore, it renders completely valueless the verification itself. I have no doubt of the viciousness of such a form of denial. It follows from what I have stated that the motions should be denied, except in so far as the allegations last mentioned are concerned. The answers containing such allegations must be made more definite and certain, by separately setting forth the allegations which are denied upon information and belief and those which are otherwise denied. Costs are not awarded on any of those motions.

Notice of settlement of the orders should be given.

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\* It is a fundamental rule that if a party wishes to traverse a fact, alleged in the pleading, which he is called upon to answer, he must deny the same in plain and unambiguous terms. Pfandler P. F. Co. v. McPherson, 20 *State Rep.* 478.

The parts to which the answer is intended to apply should be so defined that the Court, on looking at the complaint, can determine what parts are covered by it. Davison v. Sohermerhorn, 1 *Barb.* 480; Mattison v. Smith, 1 *Rob.* 706.

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Steel v. Rosenberg.

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STEEL v. ROSENBURG.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,  
APRIL, 1895.

§§ 1421-1423 inclusive, 1704.

*Amended complaint—changing cause of action from replevin to trover—indemnitors substituted as defendants in place of sheriff.*

Where goods are replevied by a coroner from the sheriff, who held them under an execution, and the sheriff demanded the return of the goods, delivering the affidavit and undertaking required by section 1704 of the Code of Civil Procedure, and the goods were so returned, the sureties on said undertaking cannot be substituted as defendants in an action for conversion against the sheriff.

Said sureties on the undertaking cannot be regarded as participating in the original conversion of the goods by the sheriff and therefore responsible for complicity in the trespass, but are liable on their bond as indemnitors only; and where the sureties have been substituted as defendants in the action in place of the sheriff, a motion to amend the complaint by changing the cause of action from replevin to conversion will be denied. *Dyett v. Hyman*, 120 N. Y. 851, distinguished.

(Decided April 9, 1895.)

Motion by plaintiff for leave to serve on amended complaint, changing the cause of action from replevin to conversion.

The facts are stated in the opinion.

*Stern & Rushmore*, for plaintiff and motion.

*Blumenstiel & Hirsch*, for defendant, opposed.

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BEEKMAN, J.—This is a motion for leave to serve an amended complaint, changing the cause of action from replevin to trover. The facts upon which the motion is based may be briefly stated as follows: Abraham Levy and Jacob Levy obtained certain goods from the plaintiffs by means of false and fraudulent representations. These goods were levied upon by the Sheriff under an execution which was issued under a judgment obtained against the Levys by a creditor. Thereupon the plaintiffs instituted proceedings by replevin to recover possession of the goods in question, supposing that they had a right to maintain such an action. Under their direction the goods were taken possession of by one of the Coroners, whereupon the Sheriff demanded the return of the property, delivering the affidavit and undertaking required by section 1704 of the Code of Civil Procedure. The property was thereupon returned to the Sheriff. The defendants in this case are the sureties upon the undertaking, and on their own motion have been duly substituted as defendants in this action in place of the Sheriff. Subsequent to the bringing of this suit, the Court of Appeals in the case of *Wise v. Grant* (140 N. Y. 593), decided that such an action could not be maintained where goods were obtained by fraudulent representations, unless the plaintiff had actually rescinded the sale before the property had been levied upon by the Sheriff. As no such rescission is claimed by the plaintiffs to have taken place prior to the seizure by the Sheriff of the goods in question, it is conceded that the action, in its present form, cannot be maintained. The plaintiffs claim, however, that they are entitled to hold the defendants, who are the sureties on the undertaking, for a conversion of the property on the theory that they are liable for the wrongful act of the

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Sheriff, and that whatever damages could have been recovered in an action against him for conversion are recoverable against them. In support of this theory the learned council for the plaintiffs appeals to the case of *Dyett v. Hyman* (129 N. Y. 351) as an authority. That case, however, was one in which an action was brought by the assignee for the benefit of creditors of one Jacob Kapp to recover the value of a stock of merchandise taken from the assignee by the Sheriff under attachments issued in suits brought against the assignor by certain of his creditors. The theory of the action was that the assignment was fraudulent and void. When the goods were seized by the Sheriff under those attachments, the attaching creditors indemnified him, and the indemnitors were substituted in the action as defendants in place of the Sheriff under sections 1421 to 1423 of the Code of Civil Procedure. It was claimed in that case by the defendants that they were liable as indemnitors only, and were governed by the provisions of their bond; but this position was held to be untenable, the Court stating (p. 357) that "the liability of the defendants rests wholly upon their participation in the original wrong and their liability for its consequences incurred by reason of their complicity in the trespass. This, it is true, is evidenced by the bond of indemnity, which authorized the Sheriff to consummate the original wrong by an unlawful sale and conversion of the plaintiff's property, but in no sense is the action upon the bond."\* That

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\*The execution of a bond to a Sheriff indemnifying him against damages resulting from an unlawful levy and sale of property made by him, presumptively establishes the liability of the obligors as principals for the original trespass committed by the Sheriff. Those thus connected with the original wrong are jointly and severally liable with the Sheriff and it is no defense in an action by the owner of the property against one or more of the wrong-doers,



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case, however, is not analogous to the present one. There the indemnitors deliberately assumed a responsibility for the unlawful act of the Sheriff in converting plaintiff's goods, and were participants in the wrong done, causing it in the sense that, but for the bond which they gave, the Sheriff would have refused to take the property. There was no question in the case as to the form of the action or as to the right of the plaintiffs to recover if the facts which they alleged were supported by proof. In the present case, however, it is now conceded that the plaintiffs, at the time that the property was replevined, had no right to recover possession of it in such an action. The defendants were guilty of no other act than that of furnishing an undertaking by which they bound themselves to the plaintiffs "for the delivery of the said chattels so replevined to the plaintiffs, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death; and for the payment to them of any sum which the judgment awards against the defendant in this action." How, then, can they be said to have participated in an act of conversion, now al-

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to show that others were not joined as defendants who are also liable. (*Dyett v. Hyman*, 129 N. Y. 851.)

Where the indemnitors of the Sheriff are allowed to intervene in an action against the Sheriff, it is not necessary for plaintiff to prove any cause of action against them. It is only necessary to prove the cause of action against the Sheriff. When the record shows that indemnity on the part of the judgment-creditors was given to the Sheriff for the purpose of making a levy, the presumption necessarily arises that it was given at their request, and that by the fact of giving it, they made themselves liable for the trespass. (*Pool v. Ellison*, 80 *State Rep.* 185. *Kerner v. Boardman*, 14 N. Y. *Supp.* 787.)

Obligors in an indemnity bond to a Sheriff are principals and jointly and severally liable with him for a wrong committed. (*Jakobi v. Gorman*, 1 *Misc. R.* 223.)

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leged against the Sheriff, when their only act was to secure to the Sheriff the restoration of property which it now appears the plaintiffs had forcibly taken from him without warrant of law? They were not parties to the original trespass committed by the Sheriff; their intervention in the matter was subsequent to the first seizure. Nor can they be said to have participated in any subsequent act of the Sheriff in dealing with the property. They simply stood in the position of guaranteeing the plaintiffs that if they succeeded in obtaining a judgment for the return of the property and for damages, they, as sureties of the Sheriff, would stand responsible for the delivery of the property and for the payment to them of any sum which the judgment awarded against him; that is, for such damages as by law might be recoverable in such a form of action. They in no sense undertook to stand behind the Sheriff as indemnitors against the consequences of his unlawful acts. Their connection with the matter began and ended with a single act, by which they made it possible for the Sheriff to resume possession of property which it is now conceded the plaintiffs had no right to take from his possession in the manner in which it was done. It would be a monstrous act of injustice to attempt to hold these defendants for the wrongful act of the Sheriff in converting the property in which they were in no proper sense participants. The action is brought against them, not upon their bond, but upon the theory that, in giving the bond for the purpose of restoring to the Sheriff that which had been taken from him by unlawful means, they had rendered themselves liable for some other act, in no way associated with the only question in which they were interested or with which they were connected, namely, the right of the plaintiffs to take the property in question in the particular

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way in which it was attempted. Surely the plaintiffs cannot be entitled to recover damages against these defendants, whose only act consisted in preventing the plaintiffs from retaining possession of property which under undisputed law they had no right to take in the manner attempted. I am satisfied, upon the consideration which I have been able to give to the question, that the plaintiffs cannot recover against the defendants for the conversion of which the Sheriff has been guilty, and that the motion for leave to serve an amended complaint, changing the action to one for conversion, should not be granted.

The motion is therefore denied, with costs.

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MASON v. DUTCHER.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
APRIL, 1895.

§§ 507, 508, 546.

*Answer—partial defense—must be expressly stated.*

It is well settled that where there is a semblance of a cause of action or defense set up in a pleading, its sufficiency cannot be determined on a motion to strike it out as redundant or irrelevant. Scandalous matter will, however, be stricken out on motion.

The provision of the Code of Civil Procedure (section 507) prescribing that "each defense or counterclaim must be separately stated and numbered," means nothing more than that there shall be a plain and concise statement of any new matter constituting a defense. Each statement intended as a defense must be complete in itself; but no formal commencement and conclusion is necessary.

A partial defense must be pleaded as such, and unless so pleaded it will be assumed on demurrer that the facts in relation thereto are pleaded as a complete defense.

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Where the portions of the answer complained of clearly indicate that the matters set up are intended as a complete defense, and there is no statement to the contrary, it must be assumed that the answer refers to the entire complaint, which sets forth but a single cause of action, and a motion requiring the defendant to make said answer more definite and certain, will be denied.

Where the answer in its last paragraph "denies the allegations of the complaint and each and every one of them, except as hereinbefore controverted or admitted," *Held*, there is no difficulty in ascertaining what is admitted and controverted before the last paragraph of the answer is reached; there is no doubt or confusion as to the application of this general denial; and a motion to make answer more definite and certain on this ground will be denied.

(Decided April 9, 1895.)

Motion by plaintiff to compel defendant to make his answer more definite and certain.

The facts are stated in the opinion.

*J. Noble Hayes*, for plaintiff.

*Frank Loomis*, for defendant.

GIEGERICH, J.—It is well settled that where there is a semblance of a cause of action or defense set up in a pleading, its sufficiency cannot be determined on a motion to strike it out as redundant or irrelevant (*Walter v. Fowler*, 85 N. Y. 621; *Bradner v. Faulkner*, 93 *id.*, 514, 518). The matters sought to be expunged from the answer as irrelevant and redundant, considered together, constitute, in my opinion, more than a semblance of a defense to the cause of action alleged in the amended complaint, and hence the motion to strike out the same should be denied. I think, however, that the words referred to in that part of the notice of motion designated "C. 7th" are scandalous (see *Allen v. Murray*, 23 *Civ. Pro.* 54), and therefore should be stricken out. The plaintiff also moves to

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require the defendant "to make his answer more definite and certain by stating unequivocally and explicitly whether or not he intends the words or matters referred to in subdivisions numbered 'II to IX, both inclusive, and subdivision XI' to constitute a defense to such action, or any part thereof, and interpose the same as such." The object in doing so is stated in plaintiff's brief to be "to compel the defendant (under section 546 of the Code) to state definitely whether he intends the separately numbered paragraphs of the answer denominated further defenses as separate and distinct defenses, so that the plaintiff may have an opportunity of demurring to them." Answers are separated by the Code into two classes—those which consist of denials, and therefore serve the sole purpose of raising a direct issue upon the plaintiff's allegations, and those termed "new matter," that is, facts different from those averred by the plaintiff and not embraced within the judicial inquiry into their truth (*Pomeroy's Code Remedies*, section 593, pp. 675, 676). The Code prescribes that "each defense or counterclaim must be separately stated and numbered" (*Code Civ. Pro.*, § 507). "This," said Sanford, J., in *Bridge v. Payson*, (5 *Sandf.* 216), in passing upon a similar provision contained in the old Code, "means nothing more than there shall be a plain and concise statement of any new matter constituting a defense. Each statement intended as a defense must be complete in itself; but the Code does not require any formal commencement in conclusion of such statements. On the contrary, the whole spirit of the Code is hostile to both." \* The

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\* A motion is not proper where there is no uncertainty or indefiniteness in respect to the nature of the charge. The section is not to enable a party to obtain a statement of particulars or circumstances of time and place. *Tilton v. Beecher*, 59 *N. Y.*, 176.

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Code further prescribes : "A partial defense may be set forth as prescribed in the last section ; but it must be expressly stated to be a partial defense to the entire complaint or to one or more separate causes of action therein set forth. Upon a demurrer thereto, the question is whether it is sufficient for that purpose" (*Code of Civ. Pro.* § 508). It is well settled that a partial defense must be pleaded as such, and unless so pleaded it will be assumed on demurrer that the facts in relation thereto are pleaded as a complete defense (*Thompson v. Halbert*, 109 *N. Y.* 329; *Pomero's Code Remedies*, 3d ed., § 608, p. 690). The case of *Burke v. The N. Y., N. H. & H. RR. Co.* (39 *St. Rep.*, 241, 59 *Super. Ct.*, 569, 15 *Suppl.* 148), cited by plaintiff's counsel, has no application to the case at bar. The former was brought to recover a penalty against a railroad company to recover a penalty for charging more than the legal fare, a portion of the answer was "defendant reserving the objection that this action cannot be maintained by reason of the fact that the summons herein was not served upon the defendant by an officer authorized by law to collect an execution issued out of said Superior Court answers the complaint," &c. Upon a motion to strike out this portion of the answer, or, in the alternative, to amend it by stating unequivocally whether or not it was intended as a defense, and if so, to separately state and number it, the Court in granting the motion said : "If it is intended to be issuable matter, and relied upon as a defense, it

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The right to relief depends upon whether or not the charge is obscure ; if the precise nature of the charge is apparent, then the statute is not authority for granting relief. The insufficiency must clearly appear. *Cook v. Matteson*, 19 *Civ. Pro. R.* 391.

The separate defenses, separately stated, take the place of separate pleas. *Cobb v. Frazer*, 4 *How.* 418.

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should be pleaded as such, and stated and numbered separately, so that the plaintiff, if he shall see fit, may test its sufficiency by motion or demurrer." In the present case the portions of the answer complained of clearly indicate that the matters set up are intended as a complete defense, and there being no statement to the contrary it must be assumed that the answer refers to the entire complaint, which sets forth but a single cause of action (*Code of Civ. Pro.* § 507). For these reasons the defendant should not in the respects referred to be required to make the answer more definite and certain. I have given due consideration to the questions presented by that part of the notice of motion designated as "I. 18th, 19th and 20," and am of the opinion that the denial contained at folio 64 of the answer is clear and explicit and leaves no room for doubt as to what was intended to be denied. Except an admission that the defendant signed the agreement set forth in the answer he denies the making of any contract with the plaintiff as alleged in the complaint. The denial contained at folio 71 is also clear and definite, and the same, as well as the denial last referred to, is sanctioned by the authorities (*Mingst v. Bleck*, 38 *Hun*, 358; *Griffin v. Long Island RR. Co.*, 101 *N. Y.* 348), consequently the motion to make these portions of the answer more definite and certain or to strike them out should be denied. The last paragraph of the answer "denied the allegations of the complaint and each and every one of them, except as hereinbefore controverted or admitted," and plaintiff moves to make the same more definite and certain "by pointing out or indicating clearly and explicitly what allegations of the complaint are intended to be reached thereby," or to strike out the said words. The form of the denial is sanctioned by the decision in *Griffin v.*

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Long Island RR. Co. (*supra*), in which the denial was almost identically the same as in this case. There is no difficulty in ascertaining what is admitted and controverted before the last paragraph of the answer is reached. This is clearly specified by the other paragraphs of the answer. Consequently there is no doubt or confusion as to the application of this general denial, and therefore the motions referred to should be denied. It follows therefore that, with the exception of striking out certain words as scandalous, which are set forth in that part of the notice of motion designated "C. 7th," the other motions should be denied; but as both parties have been successful in part, neither of them should have any costs as against the other.

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EDMUND S. WHITMAN, AND ANOTHER, APPELLANTS, v. EDWIN L. JOHNSON, RESPONDENT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,  
APRIL, 1895.

§§ 1005, 1292.

*Appeal from order denying motion for new trial—judgment vacated though not expressly appealed from—restitution.*

An amended order of the General Term, reversing an order of the Trial Term denying a motion for a new trial on the judge's minutes, should contain a provision that the judgment be vacated and set aside, and restitution of the moneys paid under it made to the plaintiffs, with judgment and execution therefor. The provision of section 1005 of the Code of Civil Procedure, that the entry of final judgment and the subsequent proceedings to collect, and otherwise enforce it, may be stayed by order, on a motion for a new trial, and that where a new trial is granted,



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the Court may direct and enforce restitution, as where a judgment is reversed upon appeal, plainly implies the authority to vacate the judgment even though no appeal from said judgment is expressly taken.

Where the General Term grants the relief which should have been given at Trial Term or Special Term, upon a motion for a new trial, it may, of course, exercise the same power over the judgment possessed by the Special Term or Trial Term and, in granting a new trial, may vacate the judgment and order restitution.

(Decided April 13, 1895.)

Settlement of order upon decision of the General Term of this Court (January, 1895), reversing an order denying a motion for a new trial.

*Osgood Smith*, for plaintiffs, appellants.

*Southard & Fairchild*, for defendant, respondent.

DALY, C. J.—The plaintiffs appealed from an order denying their motion for a new trial, but not from the judgment dismissing their complaint. The order having been made at a Trial Term of this Court, the appeal from it could be entertained by our General Term (*Voisin v. Commercial Ins. Co.*, 123 N. Y. 120). After hearing argument on the appeal the General Term ordered a new trial. The order entered upon the decision reversed the judgment and ordered a new trial with costs to the appellant to abide the event, and also directed a restitution of the moneys collected under said judgment, being the costs and extra allowance awarded, with interest, and allowed judgment and execution therefor against defendant.

The order was subsequently amended by striking out the provision reversing the judgment and substituting in place thereof a direction that the order denying plaintiffs' motion for a new trial be reversed,

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with costs to the appellant to abide the event ; and the question as to further resettlement of the order was referred to this General Term. The amended order should have also contained a provision that the judgment be vacated and set aside, and restitution of the moneys paid under it made to the plaintiffs, with judgment and execution therefor.\*

While there can, technically, be no reversal of a judgment which has not been appealed from, it must necessarily be vacated and set aside if a new trial be granted ; since it is then wholly without foundation. Otherwise, if plaintiffs recovered upon the second trial, there would be contrary judgments upon the same issues in the action ; if, indeed, upon the second trial, the plaintiffs would not be embarrassed by a former, unreversed, adjudication upon the facts in favor of defendant.

The Code provides that the entry of final judgment and the subsequent proceedings to collect, or otherwise enforce it, may be stayed by order, on a motion for a new trial, and that where a new trial is granted the Court may direct and enforce restitution as where a judgment is reversed upon appeal (§ 1005). The authority to vacate the judgment, if the motion for a new trial is granted, is plainly implied in this section ; for, if the entry of judgment, or the enforcement of it, may be stayed pending the motion, the judgment is clearly made dependent upon the result of the motion. The express authority in the section for ordering restitution if a

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\* Where a collected judgment for costs is set aside and a new trial had which results in a verdict in favor of the party paying the judgment, the order for restitution is to be enforced by execution as on a money judgment, not by proceedings for contempt. *O'Gara v. Kearney*, 57 *How. Pr.* 439.

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new trial is granted implies that the judgment, if entered and collected pending the motion, is to be set aside.

Had the motion for a new trial been granted at the Trial Term or the Special Term, the judgment, if already entered, would have been necessarily vacated as part of the relief upon that motion. Such was the practice in *O'Gara v. Kearney* (77 N. Y. 423) which was a case resembling the present in many particulars. "The jury rendered a verdict in favor of the defendant. Upon this verdict judgment was entered dismissing the complaint and for \$125 costs. The costs were voluntarily paid to the defendant's attorney. The judgment was afterwards, on motion, set aside, on the ground that improper evidence was admitted on the trial." An order for restitution was made at Special Term in that case under the authority of section 1292 of the Code, which provides, "Where a judgment is set aside for any cause, upon motion, the Court may direct and enforce restitution in like manner, with like effect and subject to the same conditions as where a judgment is reversed upon appeal."

Where the General Term grants the relief which should have been given at Trial Term or Special Term upon a motion for a new trial, it may, of course, exercise the same power over the judgment possessed by the Special Term or Trial Term, and in granting a new trial may vacate the judgment and order restitution. As to the propriety of ordering restitution of the costs of the former trial collected under judgment which is now vacated, there can be little question. The parties should be restored to their original position. If the defendant is again successful and is entitled to the costs of the former trial, he can again tax them and collect them ; if he is not (under the terms

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of the order awarding costs *to the appellant* to abide the event) entitled to the costs of the former trial (Starr Cash Co. v. Reinhardt, 26 Supp. 746) he should not retain them now, because he cannot have them in any event. It is to be observed, also, that the judgment includes an extra allowance which necessarily falls with it, and could not be taxed upon the new trial without a new order for allowance.

The order of reversal as amended must therefore be further amended and settled by providing that the judgment entered by defendant in this action be vacated and set aside, and that plaintiffs have restitution of the amount collected thereon and have judgment and execution therefor.

BISCHOFF and PRYOR, JJ., concurred.

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IN THE MATTER OF THE APPLICATION OF ANDREA FONTANA, AND ANOTHER, TO BE MADE PARTIES DEFENDANT IN THE SUIT OF THE ATLANTIC TRUST COMPANY, AS TRUSTER, v. THE HASKIN WOOD VULCANIZING COMPANY.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,  
MARCH, 1895.

§ 452.

*Application to be made party defendant—when not granted.*

In an action to foreclose a mortgage on the property of a corporation, the corporation is the real party in interest, and where it has been joined and interposed its defenses to the mortgage, the stockholders are not entitled, as a matter of right, to be brought in; the question being one clearly within the discretion of the court.

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In an application by stockholders to be made parties defendant in order to appeal from a judgment against the corporation, it is incumbent upon them to set forth sufficient facts, not only showing the likelihood of reversal on appeal ; but going a step further and showing that the final result, so far as the corporation and stockholders were concerned, would be a more favorable judgment.

Although the court has the power in a proper case to permit a stockholder to intervene, still after judgment obtained "after a real litigation, by a court of competent jurisdiction" and without allegations "made against it on account of which a court of equity in a collateral action would have jurisdiction to set it aside," the rights of stockholders to revive and extend the time to appeal is, to say the least, doubtful after such time, so far as the corporation is concerned, has expired and its right to appeal has been lost.

(Decided March, 1895.)

*Franklin Bien*, for appellant.

*William C. Osborn*, for respondent.

Appeal from order denying motion of stockholders to be made parties defendant.

The petition of the stockholder Fontana, in which another stockholder joined, and which is the basis of this application, shows that an action was begun in this Court wherein the Atlantic Trust Company, as trustee, is plaintiff, against the Haskin Wood Vulcanizing Company, for the foreclosure of a mortgage upon all the property of the corporation ; that in furtherance of a scheme in the interest of the bondholders the president and the management of the corporation permitted the plaintiff to enter a judgment of foreclosure and sale on the 18th day of October, 1893, and the property was advertised for sale on the 20th of November, 1893. In October, 1893, certain judgment creditors commenced an action to sequester the property of the corporation, in which action one David Thom-

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son was appointed receiver of the corporation and took possession of its property.

Subsequently an order was made by this Court opening the judgment of foreclosure and allowing the receiver to come in and defend. After his answer was interposed, the issues were by consent referred to a referee to hear and determine. The referee subsequently reported in effect that the mortgage was invalid as a lien upon all the property of the corporation as to the creditors and receiver, but valid as against the corporation as to a portion of the property, and directed a sale and judgment for deficiency, if any, that there was due plaintiff. Such judgment was entered and a sale advertised thereunder. The receiver likewise advertised a sale of all the property of the corporation. Certain stockholders and judgment creditors requested the receiver to appeal from the judgment of foreclosure, and on his refusal requested the Court so to instruct him, which the Court, for reasons stated in the opinion, declined to do.

The petitioner, after reciting such facts, says: "As I am advised and verily believe, my rights as a stockholder of the defendant corporation are seriously endangered and imperiled by said judgment, unless I am allowed to come in and defend the action and appeal. \* \* \* That I supposed that said David Thomson was appointed receiver to protect the rights of the stockholders as well as all others interested in the defendant corporation, but as I am informed and believe, and as shown by his affidavit in the motion to instruct him to appeal, he acts simply for the creditors, and does not intend to protect the rights of the stockholders."

This petition is supported by affidavits, the one presented by the stockholder who joins in the petition

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showing that upon an application made to the Attorney-General to take into consideration the position assumed by the receiver, there resulted an arrangement by which he was permitted to appear at the reference, examine and cross-examine the witnesses, and in every way to assist the receiver in maintaining the defenses that had been interposed to the validity of the mortgage.

In answer to the petition and affidavits, the receiver denies that portion of the petition which states that the receiver "acts simply for the creditors, and does not intend to protect the rights of the stockholders." We have also the affidavit of the attorney for the Atlantic Trust Company, trustee, plaintiff in the foreclosure suit, showing the five grounds of defense set up by the receiver and all the proceedings subsequently had; from which it would appear, not only that the stockholder who joins in this petition took an active part throughout all the proceedings, but that at different stages the attorney for the petitioner intervened, notably after the motion for judgment upon the referee's report, and prior to the entry of judgment upon a settlement of an order for sale.

In addition to the showing thus made of the part taken by the petitioners and their knowledge of the proceedings in the foreclosure suit, the attorney for the trust company in his affidavit directly assails the good faith of the application, and asserts that one of those stockholders (referring to the one that appeared upon the reference and examined the witnesses) has been conversant with every step of the litigation, and that "one of the Judges of this Court stated to said Mitchell that if he was not satisfied with the conduct of this litigation he should intervene, and that deponent has frequently suggested the same thing, but that

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he has not hitherto endeavored to do so ; that it is the opinion of your deponent that the object of this motion is in effect to take an appeal and use said appeal to delay the sale of the property by the receiver. That the defendant company is hopelessly insolvent, and that a speedy sale is desired and urged by ninety-five per cent. of the creditors."

Some other affidavits and papers are used, but the substantial facts relating to the merits of this application have been stated.

O'BRIEN, J.—By section 452 of the Code of Civil Procedure, it is provided that "where a person not a party to an action has an interest in the subject thereof, \* \* \* and makes application to the Court to be made a party, it must direct him to be brought in by the proper amendment." Relying, no doubt, upon the mandatory language of the section, the petitioner applies to be made a party to the end that he may appeal from the judgment of foreclosure and sale.\*

It is apparent that the proper party to the action in the first instance would be the corporation—which was joined, and which, through the receiver, interposed its defenses to the mortgage. The real party in interest, therefore, having been made a party, the petitioners were not entitled, as a matter of right, to be brought in ; the question being one clearly within the discretion of the Court (*Ithaca Gas Light Co. v. Tremain*, 93 N. Y. 660). That was an application by a

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\* A defendant who has an interest in the subject of the action has a right to be made a party, and may be made so of his own motion. But it must be made to appear that he has such interest. *Palmer v. Mut. L. Ins. Co.*, 14 *State Rep.* 759.

Third persons should not be allowed to intervene unless their presence is necessary to a complete settlement of the questions between the original parties. *Kelsey v. Murray*, 18 *Abb.* 294.



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stockholder to be allowed to come in as a party defendant in an action brought by the company against its president and treasurer for alleged malfeasance. In a memorandum handed down it is said: "The Supreme Court had the power, under section 452 of the Code, to grant or refuse Pinckney's application to be made a party to this action, and we cannot, therefore, interfere with the exercise of its discretion." The General Term, however, has the right to determine whether the discretion vested in the Special Term of the Court has been wisely exercised.

We have examined the petition and the affidavits in support thereof and those in opposition, with a view to determining that question. From them it appears that in a foreclosure suit, which was strenuously fought, with the aid of one of the petitioning stockholders, by the receiver, a decree or judgment of foreclosure and sale has been rendered. That such judgment was in some respects favorable to the receiver appears; and that the difference of opinion which has arisen between the receiver and the petitioning stockholders as to the propriety and advantage of appealing resulted in this application. As against the opinion of these stockholders, who hold shares of the corporation individually, the par value of which represents a large sum, the receiver in his refusal to appeal is supported by ninety-five per cent. of the creditors.

Whether the course pursued by the receiver in not appealing was right, or whether the opinion expressed by counsel for the petitioners is correct, that the judgment would be reversed on appeal, must remain a subject of conjecture in the absence of anything before the Court enabling it to determine that question. It is true that the form of the judgment seems anomalous, in that it holds the mortgage void in part, so far

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as it affects the receiver, and valid with respect to certain property, so far as it affects the corporation; but it would be hazarding an extreme opinion to hold, upon this mere appearance of inconsistency in the judgment, that it was invalid and should be reversed. Such a conclusion without anything before the Court upon which to base it, would be to destroy all the presumptions which naturally exist in favor of the validity of judgments. We think, therefore, that it was incumbent upon the petitioners to have set forth sufficient facts, not only showing the likelihood of reversal on appeal, but going a step further and showing that the final result, so far as the corporation and stockholders were concerned, would be a more favorable judgment. It may well be that this judgment was as favorable to the corporation as it had a right to expect, in which event the refusal of the receiver to go further would be but protecting the interests of the corporation which he represented. Upon the meagre facts presented in support of the application, either relating to the merits or showing that the receiver in refusing to appeal acted in bad faith or contrary to the interests he was appointed to protect, no collusion or fraud being charged, and in the light of the opposing affidavits, we cannot conclude that the Special Term improperly exercised its discretion.

Apart from this, we think the relief sought of doubtful utility, in view of the judgment which has been entered against the corporation, the time to appeal from which as respects the corporation having expired.

In *Alexander v. Donohoe*, (143 N. Y. 203), which was an action brought by a stockholder to set aside and annul various transactions relating to and conveyances of property alleged to belong to the corpor-

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*Fontana v. The Haskin Wood Vulcanizing Co.*

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ation, among others, the foreclosure of a mortgage executed by the company, on the ground that the conveyances and transactions, including the foreclosure proceedings, were fraudulent, but the complaint in which action did not allege collusion or other grounds that would give a Court of equity jurisdiction to set aside the judgment against it, it was held that the plaintiff was estopped by said judgment, the Court, in the course of the opinion, saying: "Suing as a stockholder, the plaintiff's right of action is a derivative one. He sues, not primarily in his own rights, but in right of the corporation. The wrongs of which he complains are wrongs to the corporation; they were not aimed at him, and did not involve his personal or individual rights. He stands as a member of the corporation, and it is the party to sue for and recover damages for the wrongs or equitable relief against the frauds alleged." And in speaking of the action, the judgment recovered in which was sought to be set aside, the opinion continues: "And in that action substantially the same issues were offered as are presented by the pleadings in this action, and the adjudication then upon the issues was against the defendants there. The judgment in that action was rendered without any collusion, after a real litigation, by a court of competent jurisdiction, and no allegations are made against it on account of which a court of equity in a collateral action would have jurisdiction to set it aside. The judgment binds this plaintiff as a stockholder \* \* \* and bars his recovery in this action."

The distinction between the action thus brought by the stockholder and an application made upon petition to be allowed to intervene in the very action in which the judgment was obtained is of course ap-

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parent; but this does not destroy the rule that is applicable in respect to the binding force and effect of a valid judgment. If the petitioners can be permitted practically to occupy the position of the receiver, who refuses to appeal, and in his stead contest on behalf of the corporation the validity of the mortgage, then we see no reason why, if these stockholders are defeated, other stockholders may not come in, and so on *ad infinitum*. Such a course would indefinitely postpone a sale. Unquestionably the court has the power in a proper case to permit a stockholder to intervene, as shown by the case already referred to of Ithaca Gas Light Co. v. Tremain; but after judgment obtained, as said in *Alexander v. Donohoe* (*supra*), "after a real litigation, by a court of competent jurisdiction," and without allegations made against it on account of which a court of equity in a collateral action would have jurisdiction to set it aside," the rights of these petitioners to revive and extend the time to appeal is, to say the least, doubtful, after such time, so far as the corporation is concerned, has expired and its right to appeal has been lost.

Without deciding this, however, we think that where, as here, no fraud or collusion, so far as the receiver is concerned, is charged, and where from the facts it cannot be determined whether or not the refusal of the receiver to appeal—in which he seems to have been supported by so many interested—was justifiable, after a litigation actively and strenuously fought by one at least of the petitioning stockholders, no sufficient ground was presented to the court below, to require it, in the exercise of a wise discretion, to grant the right to intervene. Upon examination we have concluded that no proper case has been made-

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In the Matter of DeForest.

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out which would justify us in interfering with the discretion exercised by the Special Term.

Order affirmed accordingly, with ten dollars costs and disbursements.

VAN BRUNT, P. J., and PARKER, J., concurred in the result.

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IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE  
ACCOUNT OF MARGARET H. DEFOREST, AS  
ADMINISTRATOR OF CHARLES T. DEFOREST, DE-  
CEASED.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,  
APRIL, 1895.

§ 2728.

*Accounting in surrogate's court—issue of citation to creditors who  
have been paid.*

Under section 2728 of the Code of Civil Procedure, providing for the judicial settlement of the accounts of an executor or administrator, a creditor or a person interested in the estate, though not cited, is entitled to appear at the hearing and thus make himself a party to the proceeding. And this is true of creditors whom the executor claims to have paid in full, and for which payment he presents vouchers.

Although the failure to cite paid creditors does not oust the court of jurisdiction in respect to the accounting, still it is the better practice where possible, to cite the parties who were interested in the estate at the time of the death of the decedent, and where the citation has issued, the General Term will not, except in a very plain case, say that it was not a wise exercise of power, and grant a motion for reargument.

(Decided April, 1895.)

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In the Matter of DeForest.

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**Motion before the General Term for a reargument.**

Letters of administration of the estate of DeF. were granted June 2d, 1893. The administratrix duly advertised for claims, and the claims and bills of some forty creditors were presented pursuant to the notice. In November, 1894, she filed in the Surrogate's Court an account of her proceedings, with a petition, duly verified, wherein she alleges that all the claims of creditors were particularly set forth in her account, and that all the original claims, each bearing on its face proof of payment in full, were annexed to the account; that all the said claims had been paid by checks drawn on a trust company, each check being drawn to the order of the respective creditor, bearing on its face a statement of the nature of the claim and having on its back the indorsement of the creditor and proof that it had been collected and paid in the usual course of business.

The claims and returned checks were filed with the account as alleged in the petition. The petition further alleged that no claims of creditors other than those so filed had been presented and that there were no other creditors of the estate, and prayed that the account be judicially settled, and that the next of kin and surety on the bond be cited accordingly. The next of kin all waived citation, and the surety appeared by attorney.

It appeared from the account that there was a balance of some two thousand dollars distributable among the next of kin. On the return of the citation the Surrogate held that the paid creditors must be cited, and made an order directing that a supplemental citation issue, directed to all the creditors whose claims appeared to have been paid, and staying the entry of

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any decree settling the account until the return of such citation.

On appeal to the General Term of the Supreme Court this order was affirmed, without an opinion. [In a subsequent case the Surrogate held that "the decision in the case of DeForest, having been affirmed at the January General Term of the Supreme Court, must be followed in other cases presenting the same question. Where it appears from the petition or from the account that debts have existed, the creditors must be cited in the accounting, notwithstanding the statement in the account that such debts have been paid by the accounting parties. The creditors are entitled to a hearing on the allegation of payment and an opportunity to controvert it. The rule may involve labor and expense, but it is just."]

On motion before the General Term for a reargument the following opinion was rendered :

*Rastus S. Ransom*, for the motion.

*S. S. Perry*, opposed.

PER CURIAM.—The appeal in this matter was taken from an order of the Surrogate's Court directing a supplementary citation to all the creditors of the estate, including those whose claims the administratrix claimed to have paid in full. Upon the argument of this appeal the order of the Surrogate was affirmed, and this motion for a reargument is made upon the ground, apparently, that it has not been the customary practice to cite creditors upon an accounting whom the executor or administrator claimed to have paid in full, and for which payment the executor or administrator presents alleged vouchers.

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In the Matter of DeForest.

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It is a familiar rule upon an accounting to cite all legatees, whether vouchers for the payment of their legacies are produced or not: and it is difficult to see how there can be any distinction between the case of a legatee of the decedent and that of a creditor of a decedent. Certainly in the statute, where the question of citation is spoken of, no such distinction is hinted at. Section 2728 reads as follows: "In either of the following cases an executor or administrator may present to the Surrogate's Court his account and a written petition, duly verified, praying that his account may be judicially settled; and that the sureties in his official bond or the legal representatives of such surety and creditors or persons claiming to be the creditors of the decedent and the decedent's husband or wife, or next of kin and legatees, if any, or if either of these persons is dead his executor or administrator, if any, may be cited to attend the settlement."

The right to this accounting depends upon the lapse of one year and the publication of a notice to creditors. The Surrogate upon the presentation of such a petition, must issue the citation accordingly. And there is a further provision that a creditor or a person interested in the estate, although not cited, is entitled to appear at the hearing and thus make himself a party to the proceeding. It would seem, therefore, that it was in contemplation of the statute that all creditors of the decedent should be cited, and if they are dead, their executors or administrators, if any there be. It may well be that where a creditor has not presented his claim, and has not thereby intervened in the proceeding, he may not be entitled to notice. But having intervened by the presentation of his claim, it is difficult to see upon what theory he should be ignored in the subsequent proceedings.



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It does not seem to be any answer to this suggestion that the executor claims to have paid the creditor in full and presents a voucher; because the creditor, if he were allowed an opportunity to do so, might be able to establish that the voucher presented was not his and that he had not been paid.

In view of the provision that a creditor or person interested in the estate is entitled to appear on the hearing and thus make himself a party to the proceeding, although not cited, it may be that the failure to cite the creditor does not oust the court of jurisdiction in respect to the accounting. But it is manifest that it is the better practice, where it is possible, to cite the parties who were interested in the estate at the time of the death of the decedent, unless there is some reason shown why the ordinary course should not be pursued.\*

The argument that it is difficult in many cases to serve a citation upon all creditors, whether they have been paid or not, does not seem to be entitled to a great deal of weight; because if any obstacles exist

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\* An allegation by any person that he is a creditor entitles him to become a party to a contest over executor's accounts. *Greene v. Day*, 1 *Dem.* 45.

The only authority for the voluntary intervention in proceedings for executors' and trustees' accountings of any person other than the petitioner or petitioners and the person or persons by him or them caused to be cited, rests upon sections 2781 and 2810 and these sections do not sanction such intervention until "the hearing." *Estate of Wood*, 7 *State Rep.* 731.

A creditor does not lose his right to appear on an executor's accounting by failing to present his claim in pursuance of notice. *Greene v. Day*, 1 *Dem.* 45.

A person not cited to an executor's accounting may appear on the hearing and contest it, and if his claim is disputed by the executor, the Surrogate cannot exclude him as not being a creditor, since he cannot determine a disputed claim. *Martine's Estate*, 11 *Abb. N. C.* 50.

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which cannot be overcome, undoubtedly service of citation may be dispensed with. The language of the statute does not seem to have made it obligatory upon the Surrogate to issue such citation. But where the Surrogate has directed such a citation to issue, this Court should not, except in a very plain case, say that it was not a wise exercise of power. Parties, in case they desire upon the payment of claims to obviate the necessity of serving citations upon such creditors as they have paid, may very easily take a waiver of citation in the manner provided for by the practice in the Surrogate's Court.

There does not seem therefore to be any reason for a reargument, and the motion should be denied, with \$10 costs.

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LOUISA MANDER *v.* CHARLES W. LOW AND  
WILLIAM J. CROMWELL, AS EXECUTORS, ETC.,  
AND OTHERS.

SUPREME COURT, SPECIAL TERM, CHAMBERS, NEW  
YORK COUNTY, APRIL, 1895.

§§ 1814, 1823.

*Surplus moneys—construction of will—express trust created—trust  
estate not liable for debts—contracts of executors.*

No set form of words is necessary to constitute a devise in trust, but whether such an estate exists or not is a matter of construction upon a consideration of the intent of the testator gathered from the whole will, and especially is this true where the will is the handiwork of a testator unskilled in the technique of the law.

Where property is left in trust to receive the rents and profits thereof for the benefit of the testator's son, the title to the property vests

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in the trustees, and the principal of the trust is not liable for the payment of the son's debts, nor is a receiver in supplementary proceedings on a judgment against the son entitled to participate in any form in the surplus moneys arising from the foreclosure of a mortgage upon said real estate.

Contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, although the executors could properly pay for the same and be allowed the amount as a legitimate expenditure on a settlement of their accounts.

(Decided April, 1895.)

Motion to confirm referee's report.

The facts are stated in the opinion.

*T. B. Milliken*, for executors.

*Andrew G. Cropsey*, attorney for receiver.

*Wingate, Cullen & Miller*, attorneys for judgment creditors.

BEEKMAN, J.—Jacob Cromwell died, leaving a will by which he devised the premises 288 Front street and 226 East Twelfth street in this city, and the premises 234 and 236 Van Brunt street in the city of Brooklyn, to the children of his son, William J. Cromwell. As part of the same clause, however, the testator gave the following directions in reference to the property : "The rents thereof, after paying taxes, interest, repairs, insurance and all other charges that they be thereon both in Brooklyn and New York, shall be used in paying off the mortgages on the Brooklyn property, next in paying off the mortgages on 288 Front street, and last in paying off the mortgage on 226 East Twelfth

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street, New York. After all mortgages are paid and canceled of record, the property I bequeath to the children of my son, William J. Cromwell, the rents and profits thereof after paying all charges against the property together with all encumbrances shall go to my son, William J. Cromwell, so long as shall live, for his own use and benefit, and his death the property shall go directly to his children, share and share alike. But if my executors shall deem proper, by depreciation in value or otherwise, the avails thereof shall be invested in good bonds and mortgages on real estate, and then be divided as before mentioned, share and share alike." I have quoted the clause *in ipsissimis verbis*. It is evidently the work of the testator's own hand, quite inartificial and somewhat ungrammatical, but expressing with tolerable clearness his intention. The mortgage on No. 288 Front street, instead of having been paid off out of the rents, as directed by the testator, has been foreclosed, the property sold, and a surplus has been realized amounting to over \$5,000. Two claims have been made to portions of this fund; one by the receiver of William J. Cromwell, under a judgment recovered against him, for the payment of the amount of the judgment out of the surplus moneys; the other by certain creditors of the executors of Jacob Cromwell, who have recovered a judgment against the executors as such, and insist that they had, therefore, a lien upon the real estate and, consequently, now have one upon the surplus moneys realized upon its sale.

The question first arises, had William J. Cromwell any interest in the surplus which can be reached by the receiver? It may well be claimed that as he was to enjoy only the income of the property after payment of the principal of the mortgages, the in-

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come from the surplus moneys should be impounded to make good the appropriation which has been made of the *corpus* of the estate for the discharge of the mortgage in the foreclosure proceedings. In that view of the case, William's interest in the income would be quite remote and hardly computable. There would be practically nothing which would be available for the receiver. But there is, I think, another theory which also excludes him from any interest, and that is that the title to the property really vested, under the will, in the testator's executors in trust for the purposes of the devise during the lifetime of William. The duties to be performed in the application of the income were such as properly to require the intervention of a trustee, with the powers associated with the office for leasing the property and making thereout the income necessary to carry out the directions of the testator for its appropriation. The intention to create a trust is, I think, also reflected in the last clause of the will, which reads as follows: "I hereby appoint for my executors or trustees to attend to the distribution of my estate and property, as set forth, my son, William J. Cromwell, my son-in-law, Charles W. Low, and my friend Stephen Cutter, with powers and duties as trustees or executors of this my last will and testament to be performed by those who shall serve or act, and all the estate of one or more who shall serve or not, shall be fully vested in power and trust as above mentioned, and his or their acts shall have full power and binding force and be fully vested in power and trust." The language is that of a half-educated man with a very definite purpose, which, unfortunately, he has undertaken to express in technical form, but without the capacity to do it. However, I think it is plain that he intended the property

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in question to be held in trust during the lifetime of his son William. It might almost be said that his testamentary scheme could scarcely be carried out in any other way. It has been repeatedly held that no set form of words is necessary to constitute a devise in trust, but that whether such an estate exists or not is a matter of construction upon a consideration of the intent of the testator gathered from the whole will (*Morse v. Morse*, 85 N. Y. 53; *Ward v. Ward*, 105 N. Y. 68). Especially is this true where the will is the handiwork of a testator unskilled in the *technique* of the law. If I am correct in this view, then the title to the property was vested in the executors in trust, for the purposes specified, during the life of William, upon whose decease it is to vest in possession in his children living at the time of testator's decease, with power in the executors, on the happening of that event, should they deem it proper so to do, to invest "the avails" of the property (and by necessary implication to sell the same for that purpose) in bonds and mortgages, and divide the same among said children, share and share alike. This very direction furnishes a further indication of the intent and expectation entertained by the testator that his executors should take an active part in the care and handling of the property in question. The view taken is, I think, much more consistent with the purpose of the testator than to hold that his son William had a legal estate for life in the property, especially as the latter was to enjoy only an ultimate interest in the rents after the discharge of the mortgages affecting all of the property devised. As under this construction of the will the testator's son William took no interest which could be reached by his creditors, at least upon the facts as they appeared on the reference in this proceeding, it follows

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that the receiver is not entitled to participate in any form in the surplus moneys which must be paid to the executors to be held by them upon the trusts above mentioned. The referee, however, found that the moneys should be so paid, subject to the claim of the judgment creditors of the executors before mentioned. It appears from a certified copy of the judgment roll, among the exhibits in this proceeding, that an action was brought in this Court by the claimants, Thomas Munkenbeck and others against Charles W. Low, William J. Cromwell and Stephen Cutter, "as executors and trustees under the last will and testament of Jacob Cromwell, deceased." The complaint sets forth that, at the request of the defendants, the plaintiffs performed certain work and supplied certain materials in the construction of a sewer upon certain premises in Van Brunt street, Brooklyn, of which the testator had died seized; that the value of such work was \$167.25, of which but \$9 had been paid. Judgment is then demanded against defendants for the amount so due. The defendants made default in pleading, and suffered judgment to be entered against them. The *postea* reads that the plaintiffs "have judgment for and do recover of the defendants Charles W. Low, William J. Cromwell and Stephen Cutter, as executors and trustees under the last will and testament of Jacob Cromwell, deceased, the sum of one hundred and eighty-one 90-100 dollars, together with twenty-two 95-100 dollars costs and disbursements, amounting in the whole to the sum of two hundred and four 94-100 dollars, and that the plaintiffs have execution therefor against the defendants in their representative capacity." Upon this leave was obtained from the Surrogate to issue execution against the executors to collect from the assets of the estate, and subse-

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quently an order was obtained for the examination of one of the executors as a third party, who was alleged to have some of the property of the judgment debtors in his possession. This somewhat startling procedure now culminates in the present claim for satisfaction of the judgment out of these surplus moneys. The answer to it is quite conclusive. In the first place, the judgment in question never was and never could have been a lien upon the real estate out of which the surplus moneys were made. It is well settled law in this state that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate, although the executors could properly pay for the same and be allowed the amount as a legitimate expenditure on a settlement of their accounts (*Austen v. Munroe*, 47 *N. Y.* 360; *Del. & Lack. v. Gilbert*, 44 *Hun*, 201). As was said by Judge Allen in *Austen v. Munroe*: "The principle is that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract and thus create a liability not founded upon a contract or obligation of the testator. The rule is too well established in this state to be questioned or disregarded, and any departure from it would be mischievous." Section 1814 of the Code has made no change in this rule (*Bingham v. Marine Bank*, 41 *Hun*, 377).\* The above principle

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\* None of the provisions of this section change the rule as it existed before its adoption, that an action cannot be maintained against an executor in his representative capacity, founded on his promise



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applies equally to trustees vested with the title to property upon an express trust. There is, however, this qualification, that where the condition of the estate demands for its protection or preservation the expenditure of money which the trustee is unable to provide, it may not be doubted that he has the power to pledge the credit of the trust estate to provide for its necessities, and to agree that the person with whom he contracts shall have a charge upon the property for his reimbursement. But such a charge is one which can be enforced only in an equitable action (*Willis v. Sharp*, 113 N. Y. 586) upon evidence of the necessity for the relief and of the providence of the contract, and upon such equitable terms as the Court may prescribe. A case somewhat illustrating this principle may be found in *United States Trust Co. v. Roche* (116 N. Y. 120). The lien so acquired is, practically, one which is subject to the approval of the Court.

The facts in the present case in nowise bring it within the excepted class. It appears from some of

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based upon a transaction which originated after the death of the testator. The statutory rule is but a mere codification of the rules of law and procedure as they existed at the time of its adoption. *D. L. & W. R. R. Co. v. Gilbert*, 8 *State Rep.* 215; *Ferris v. Disbrow*, 22 *Week. Dig.* 330; *Matter of Woodard*, 18 *State Rep.* 161.

Contracts of executors, although made in the interest and for the benefit of the estate they represent, are their personal contracts and do not bind the estate. An executor may disburse and use the funds of the estate for purposes authorized by law, but he may not bind the estate by an executory contract and thus create a liability not founded upon the contract of the testator. The rule of law is not changed by section 1814. *D. L. & W. R. R. Co. v. Gilbert*, (*supra*).

Contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate. *Cary v. Gregory*, 38 N. Y. *Supr.* 137.

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the papers in evidence that the work done was rendered necessary by order of the Health Board, but the complaint does not declare upon any pledge of the property of the estate or lien acquired thereon by agreement with the trustees. The action was the ordinary one at law for work performed, and the judgment taken was a common law one for the recovery of a sum of money. It did not bind the real estate in question. The statutory provisions under which the proceedings were had before the Surrogate and leave obtained from him to issue execution do not apply to claims of this character, and in any event the Surrogate had no power to authorize an execution against the real property of the testator (§ 1823, Code of Civil Procedure).<sup>\*</sup> If the counsel for the claimants relies upon the proceedings before the Surrogate as creating a charge upon the property by virtue of the execution so authorized, he must take them with the qualification contained in the above section.

It is quite plain from what has been said that the judgment in question and the proceedings thereon do not establish any claim to the fund in question. It therefore follows that the finding of the referee that the surplus moneys are subject to the judgment in question is erroneous. The whole of such moneys must be paid without any charge upon them to the executors of Jacob Cromwell, to be held by them as trustees under the clause of the will containing the devise in favor of William Cromwell and his children.

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<sup>\*</sup> Real estate of which a testator died seized, cannot be sold on executions issued on judgments against his executor, though the will authorizes and directs the sale of such real estate for the purposes of administration and distribution, since in such case the doctrine of equitable conversion does not apply. *In re Hesdra's Estate*, 23 N. Y. Supp. 842.

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The order should contain appropriate provisions setting out the findings upon the rights and claims of the parties in conformity with this opinion.

The order should be presented for settlement on notice.

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KNORR v. BATES, *et al.*, SAME v. ATKINS, *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
APRIL, 1895.

§§ 449, 454, 455.

*Policy of insurance—in action on, underwriters properly joined as defendants—provision that attorneys in fact of the underwriters shall be sued in case of loss, held void.*

- A provision in a policy of insurance that the underwriters' liability in the event of loss, should be ascertained and enforced only in an action against their attorneys in fact, as such, *Held* to be an attempt to preclude the insured from every means of enforcement of the liability and to deprive her of her civil right to apply to the courts for redress, and being, therefore, against public policy, is illegal and void. The invalidity of this provision however, does not destroy the underwriters' contractual obligation to pay in the event of a loss.
- A clause in a contract providing that in case of a breach by one party, the other party will sue, not him but his agent, for said breach, is in effect waiving a substantial right to be asserted by a litigant, and will be held void by the Court.
- In an action brought to recover on a policy of insurance, which contains a clause that there should be a liability of each underwriter in proportion to the amount of risk assumed by him, it is proper to join all the underwriters as defendants, the complaint alleging their several liability.
- No relation of a fiduciary nature exists between underwriters and their "attorneys in fact," to make the latter "trustees of an express trusts" or parties "with whom a contract is made for the

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benefit of another," within the meaning of section 449 of the Code of Civil Procedure, allowing an action to be brought by them as such. Said section, moreover, operates only as to parties plaintiff, and not as to parties defendant.

(Decided April 17, 1895.)

Demurrer to complaint.

The facts are stated in the opinion.

*Carter, Hughes, & Kellogg*, for plaintiff.

*Lexow & Wells*, for defendants.

BISCHOFF, JR., J.—These actions are brought upon policies of fire insurance annexed to and made part of the complaints to which the demurrers are interposed. In each action the defendant who alone appears and demurs is one of the members of certain respective firms acting as attorneys in fact for the underwriters by whom the insurance was assumed. No claim is made, nor well can be, that the allegations of the pleadings are insufficient to constitute a cause of action, were the policies in suit not embodied by intrinsic reference, the ground of the demurrers being that a defense is disclosed, available to these demurrers, by the terms of the policies as set forth. The clauses upon which this contention is founded are substantially the same in each policy sued upon and these issues may be determined practically as of one action. The provision in the policy subscribed by Bates, *et al.*, as underwriters, upon which the decision of both demurrers may proceed, is as follows: "No action shall be brought by the insured to enforce the provisions of this policy except against the attorneys in fact, as representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any

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suit so brought, as fixing his individual responsibility hereunder. \* \* \* Judgment entered in such an action shall be satisfied out of the premiums in the hands of the underwriters unexpended ; if such premiums shall be insufficient, then out of the deposit made by the several underwriters ; if both be insufficient, then out of the individual liability of the several underwriters, as hereinbefore expressed and limited ; but in no case shall the judgment bind the property of the said attorneys to a greater extent than the several liabilities of each of them as individual underwriters." The demurrant in each action is one of the underwriters of the respective policies in suit, as well as a member of the firm constituting the "attorneys in fact," and the basis of the argument made is that the pleadings disclose a failure of compliance with the requirement, as to actions upon the policy noted above, the demurrant being sued as an individual, and the action not proceeding against the "attorneys in fact." Unless the causes in question operate to oust the court of jurisdiction, there can be no question as to the propriety of joining all the underwriters, including the demurrants, as defendants, which was done in these actions ; the complaint alleging their several liability (*Code Civ. Pro.* 454) ; the joinder not affecting the individual rights of the parties (*id.*, sec. 455), and it being expressly provided by the contract that there should be a liability of each underwriter in proportion to the amount of risk assumed by him. It was the common law practice in actions upon insurance policies of this character for the court to make a "consolidation rule," upon consent of the parties, whereby all the actions which would lie against the underwriters severally should abide the result of one (*Phillips Ins.*, 1989 and cases cited) ; this

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result was apparently what these parties in some degree attempted to provide for by agreement in advance, and there would seem to be no reason why such an agreement should not be upheld, the consent of the parties being the principal element of consideration (*Doyle v. Anderson*, 1 *Ad. and E.*, 635). How far the present agreement would be valid, in view of the provision that judgment in the action against the attorneys in fact as underwriters in their individual capacity, could be enforced only to the extent of their separate liability, need not be determined, for, as to these demurrants at least the condition has been fulfilled. Upon the point raised that the plaintiff should have instituted her action against the "attorneys in fact" as acting in some representative capacity, there can be no doubt as to the futility of the demurrant's contention.

The mere making of a contract through an attorney in fact is only an incident to the contract itself. It need not be said that the contract is just as much the engagement of the underwriters as if made directly by them. What would be the effect if the contract had been made directly with the underwriters and it had contained a provision to the effect that if there was a breach of the contract plaintiff would not sue them but would sue A? Clearly such a provision in the contract would be void. A step further. Suppose it should provide that if there were a breach of the contract certain ones of the underwriters should not be sued and held liable. That would also be void, because the liability of each is a several liability. A single underwriter makes a contract through an attorney in fact and puts a provision therein to the effect that the insured will sue only the attorney in fact and not the real party in interest.

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Would this not be void? Or, A and B make a contract under which it is provided that if there is a breach on the part of A, B will not sue A, but will sue C, who is a party to the contract only as representing A as his agent. This would be only an attempt to escape the liability on the part of A and should unhesitatingly be pronounced void by the Court; it would waive a substantial right to be asserted by a litigant (Greenhood on Public Policy, R. cccxxxiii). Except in an action against the underwriters themselves the Courts would be without jurisdiction of the persons to render judgment against them. The provision, therefore, that the underwriters' liability in the event of loss should be ascertained and enforced only in an action against their attorneys in fact, as such, no such action being legally authorized or maintainable, was, in effect, an attempt to preclude the insured from every means of enforcement of the liability. As such it aimed to deprive the insured of her civil right to apply to the Courts for redress, and the Courts of their power to extend the redress. In that aspect the provision contravened public policy, and so was illegal and inoperative (*Ray's Contractual Limitations*, sec. 21, p. 116). It was thus held with regard to a contract pursuant to the terms of which a submission to arbitration was to be the only means of redressing a breach (*Hurst et al. v. Litchfield*, 39 N. Y. 377; see also *Am. & Eng. Ency. of Law*, vol. 1, p. 664, and cases collated in note 1). The invalidity of the provision to preclude suit against the underwriters did not destroy the latter's contractual obligation to pay in the event of a loss. A distinction is here to be observed between the insured's right to payment of the sum insured and the remedy for the enforcement of such right. The promise of the underwriters to pay

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was wholly independent of the insured's promise to enforce such payment only in an action against the attorneys in fact, as such, of the underwriters. The insured's promise was intended to affect her remedy only if the underwriters failed to pay as promised by them. The facts in the case at bar, therefore, do not present a case of mutually dependent or interdependent provisions of the same contract where the invalidity of one provision necessarily involves the annihilation of others. It does not here follow that the underwriters' obligation is extended, or their liability increased beyond the terms of the contract of insurance, because the restriction of the remedy for the enforcement of the obligation or liability is removed or adjudged inoperative. Nor can it be said that these "attorneys in fact" were proper parties against whom the action could be brought by reason of their being viewed as "trustees of an express trust" or parties "with whom a contract is made for the benefit of another" (*Code of Civ. Pro.* § 449).<sup>\*</sup> The contracts were made with the underwriters themselves; a mere inspection determines the question beyond a doubt, and nothing in the pleadings gives support to an assumption that there was any relation of a fiduciary nature between these attorneys and the underwriters; nowhere does it appear that the funds applicable to this insurance are in the hands of anyone other than the underwriters themselves. Furthermore, sec. 449 of the Code of Civil Procedure operates only as to

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<sup>\*</sup> A mere agent cannot, in his own name, prosecute a suit for the protection of his principal. *Redfield v. Middleton*, 7 *Bosw.* 649.

But see, *Nelson v. Nixon*, 13 *Abb.* 104; *Habicht v. Pemberton*, 4 *Sand.* 657; *Arosemena v. Hinckley*, 43 *N. Y. Supr.* 48; *Poor v. Guilford*, 10 *N. Y.* 273.



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parties plaintiff, not as to parties defendant.\* It follows that the demurrers should be severally overruled, with costs; leave to answer upon payment of costs within twenty days.

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JARVIS v. BRENNAN, AS EXECUTRIX, ETC.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,  
MARCH, 1895.

§ 872.

*Examination before trial—before referees.*

The provision contained in section 872, subdivision 5 of the Code of Civil Procedure, providing for the examination of a sick or infirm witness before trial, was not intended to forbid the examination before trial of a party to the action on the ground of physical infirmity. The last clause in the subdivision was inserted to except a party to an action from the restriction in that subdivision.

Where the testimony of a party is important and material to her case, and by reason of great age and infirmity it is doubtful whether she can appear upon the trial, her right to an order granting leave for her examination before trial is clear, and the order may specify that such examination be taken before a referee.

(Decided March 30, 1895.)

Motion by defendant to vacate an order previously granted, for plaintiff's examination before trial.

*Woolsey Carmalt*, for plaintiff.

*Henry A. Rawcliffe*, for defendant.

BEEKMAN, J.—This action is on the Special Term Calendar and will shortly be tried. The plaintiff is 84

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\* Contra, see *Mead v. Mitchell*, 5 Abb. 92.

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years of age and is confined to her house by sickness. An order has been granted, upon her application, providing for her examination before trial, the order appointing a referee before whom the examination is to be had. A motion is now made to vacate this order, on the ground, principally, that subdivision 5 of section 872 of the Code of Civil Procedure prohibits the examination of a party where the ground for such examination is physical infirmity; and this claim is based upon the last sentence of that subdivision, which reads as follows: "But this subdivision does not apply to a case where the person to be examined is a party to the action." This same question was raised in the case of the Farmers' Loan and Trust Co. v. Siefke (144 N. Y. p. 354). At page 361, Judge Andrews, in giving the opinion of the Court, says: "This is a clear misapprehension of the Code provision (sec. 872, sub. 5) as it now stands. The last clause in the subdivision was inserted to except a party to an action from the restriction in that subdivision. A party complying with the provisions of the other sections is permitted to perpetuate his own testimony in the case by an examination before trial. There can be no doubt about the correctness of this construction."\* The other objection raised is that the examination cannot be had before a referee, because this is an equity action, and the Court at General Term in this department has held that in such actions testimony cannot be taken in that manner (*Crombie v. Manhattan RR. Co.*, 83 Hun, 1). It is true that the case in question so holds, but the facts show that the order of reference in that case was not made under sections 872 and 873 of the

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\* Ever since the amendments of 1878 and 1880, a party cannot be examined on the ground that he is sick or infirm or about to depart the state. *Williams v. Folsom*, 3 N. Y. Supp. 681.

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Code, but when the case was called for trial at Special Term, and was actually on trial, the presiding Judge suspended the proceedings and ordered the testimony to be taken before a referee. In the case of an examination of a party or a witness before trial, under section 872, the Code expressly provides (§ 873) that the order must require the party or person to be examined to appear before the Judge, or before a referee named in the order, for the purpose of taking the examination at a time and place therein specified. The right, therefore, of the plaintiff to apply for such an order is clear, and, in view of her great age and infirmities, I think that her right to have the order granted was equally clear. Her testimony upon the trial is important and material to her case. The defendants claim that she is also mentally infirm, but there are no facts before me upon which I can form any judgment as to the correctness of the opinions which are expressed on that subject. The opposing affidavits deny any mental unsoundness on her part. It may well be assumed that at her age there is some failure of memory, but, as the defendants are entitled to be represented at the examination, they will have an opportunity of developing that fact, if it exist, on the cross-examination of the witness.

The motion to vacate the order is denied, with \$10 costs.

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*In re Appley.*

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*In re* APPLEY.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,  
APRIL, 1894.

§ 796.

*Authority of substituted trustee to act—service of paper personally  
without the state.*

Where an order has been granted directing a certain person, as trustee, to pay over a stated sum of money to the petitioner annually during her lifetime, and the trustee dies, and another is appointed in his stead, the latter may continue to pay over said sums of money pursuant to the terms of the order, without further direction from the court.

Where, however, for his own protection, the trustee refuses to pay the money without an order from the court to that effect, and the petitioner applies for it, the court has jurisdiction of the matter and may grant the order without notice to the petitioner's husband, and a direction in the order to show cause, that notice of the application should be given to the husband by delivering a copy of the motion papers to him personally, without the State, is a matter of favor, and not essential to confer jurisdiction upon the court, and the service will not be set aside.

(Decided April, 1894.)

Application of Mary Appley, wife of Jacob A. Appley, for an order directing Joseph Bird, trustee of the Last Will and Testament of Jacob Appley, deceased, to pay to the said Mary Appley a sufficient portion of the income of said estate during the life of herself and the said Jacob A. Appley.

*J. and W. Shrady*, for the petitioner.

*Treadwell Cleaveland*, opposed.

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*In re Appley.*

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O'BRIEN, J.—This application is to compel Joseph Bird, trustee of the estate of Jacob Appley, deceased, to pay Mary Appley certain sums of money due her under an order of this Court from the estate. An order of this Court made on the 18th day of May, 1878, shows that the petitioner here applied to the Court for a sufficient portion of the income of such estate, upon the ground that she was the lawful wife of Jacob A. Appley, whose father, Jacob Appley, having died, left a will by which he directed his executors to pay to such son the balance of the income, rents, issues and profits, after deducting certain annuities, &c., during his life, for the support of himself and family, which will was duly admitted to probate. The order further recites the fact that Edward Schell, since deceased, was appointed the trustee under such will, and was in possession of the estate, real and personal. Proof of the service of the papers on which the application was based upon Jacob A. Appley, the petitioner's husband, is recited, who appears by counsel and consented to the order. It was further adjudged and decreed that the wife was entitled to be paid a reasonable sum of money out of such income belonging to her husband for her support; and the amount which she was to receive having been fixed and consented to by Jacob A. Appley, it was directed that such sums should be paid by Edward Schell, trustee; which order from that time until the death of Edward Schell, in December, 1893, was complied with. Joseph Bird, after the decease of Edward Schell, was duly appointed trustee in his place and stead, and out of abundant caution he expressed reluctance to comply with terms of the order, because it was thereby provided that "Edward Schell, trustee," should pay. The amount to be paid, as directed by the order, since 1880, was \$250 on the first

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*In re Appley.*

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days of February, May, August and November in each year during the lives of said Mary Appley and her husband. The amount of the net income from the date of the order up to the present time appears to have been considerably in excess of the sum of \$10,000 a year; so that if the question were open or undetermined, the provision made was by no means unreasonable. The refusal of Joseph Bird as trustee to pay necessitated this application by the wife to this Court to have the order enforced. It appears that the petitioner, the trustee and the estate are within the jurisdiction of the Court, but that for some five years past the husband has resided in New Jersey. In addition to service upon the trustee, the order to show cause directed that notice of the application should be given to the husband by delivering a copy of the motion papers to him in New Jersey. The fact that service as provided in the order was directed to be made upon the defendant personally without the state, is made the basis of an application upon the part of the husband's attorney (who appears specially for the purpose) to set aside the service upon the ground that there is no authority for such service. If the husband's presence were necessary to confer jurisdiction upon the Court, or if his presence were absolutely necessary to make the order asked for, then there might be some force in the suggestion that, as there is no provision of law made for such service as herein made, it was insufficient and void. By this petition, however, it is not sought to initiate any proceedings, nor to confer jurisdiction upon the Court, nor was the order intended to bring the husband within the jurisdiction. It was intended to give him actual notice of the application, which it has accomplished. The order made by the Court in 1878, which it is now sought to

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*In re Appley.*

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enforce, was concededly made when the Court had jurisdiction, and after appearance and consent by the husband. The order, moreover, was not a direction to Mr. Schell personally, but was a direction to him as trustee to pay these amounts, and upon his death and the substitution of Mr. Bird it would have been entirely proper for the latter, without any order of the Court, to have continued to pay as trustee pursuant to such order. Deeming it, however, proper for his own protection that the Court should assume the responsibility of authorizing him to make the payment, and having refused upon demand to pay the wife, she presented her petition, as she had a right to do ; and upon the return, the trustee submits himself to the Court without making any opposition to the application. So far, therefore, as the husband is concerned, his presence was not at all necessary ; but the Court upon the papers being presented concluded that it would be better that he should have actual notice of the application, which, as shown, he has received, because he appeared by attorney for the purpose of setting aside the service. The direction for service upon him cannot affect the validity of the order to be entered, but was made as a matter of favor, and was not a matter of right or at all necessary or essential to confer jurisdiction upon the Court. My conclusion, therefore, is that, with or without notice to the husband, the Court, upon the application of the petitioner and notice to the trustee, has authority to make the order asked for, and that the application should be granted.

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Schildwachter v. The Mayor.

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CHARLES C. SCHILDWACHTER, PLAINTIFF-APPELLANT, v. THE MAYOR, ETC., OF NEW YORK, DEFENDANT-RESPONDENT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,  
APRIL, 1895

§ 820.

*Motion for interpleader—on discontinuance of action, interest and costs allowed.*

Where the defendant in an action for rent has made a motion for interpleader, and the claim adverse to the plaintiff's has, on the return day, been abandoned, an order discontinuing the action as to all parties on payment of plaintiff's full claim by the defendant without interest or costs, should be set aside, as such interest is as much a part of plaintiff's claim as any other item constituting it, and the claim standing undisputed, he is entitled to interest as of absolute right.

The costs provided by statute are awarded upon principles of natural justice, that he who has by his resistance subjected another to the expense of litigation in the enforcement of a just demand, should make indemnity for the expense, and no precedent is to be found for the enforced discontinuance of an action without the payment of costs, upon the application of a defendant confessedly liable for the demand in suit.

(Decided April 20, 1895.)

Appeal from an order directing payment to plaintiff-appellant of the claim in suit, without interest, and discontinuance of the action, without costs. Action for rent.

*W. E. Benjamin*, for appellant.

*Francis M. Scott* and *John L. O'Brien*, for respondent.



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Schildwachter v. The Mayor.

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BISCHOFF, J.—The proceeding, of which the order appealed from is the outcome, was instituted by defendant as a motion for interpleader under section 820 of the Code of Civil Procedure. The order, however, accomplished a very different result from that originally sought, for thereby the action was directed to be terminated as against all parties concerned upon defendant's paying the plaintiff the amount of his claim, without interest or costs.

In that interest and costs were thus disallowed lies the appellant's grievance.

The claim in suit was for two months' rent of certain premises leased by defendant from plaintiff's assignor for use as a fire engine house, for the amount of which rent demand was duly made upon the proper officer and the action instituted after an interval of six months.

Two months after the commencement of the action this motion was made upon the ground that one Annie Foley laid claim to the fund in question, but upon the return day of the motion the adverse claim was abandoned, and the claimant consented to the payment to plaintiff of the amount sued for. The order now before us was thereupon made and it was thereby provided "that the sum of two hundred and twenty (\$220) dollars due for rental of premises No. 104 and 106 East One Hundred and Twenty-sixth street during the months of February and March, 1894, be and the same hereby is directed to be paid over to Charles C. Schildwachter, and that the Mayor, Aldermen and Commonalty of the City of New York thereupon be discharged from liability to either the plaintiff above named or said Mrs. Annie Foley. And that the said defendants have five days after entry of this order to pay the said sum, and the foregoing action be discontinued without costs to either party."

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*Schildwachter v. The Mayor.*

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The order to show cause, upon which the motion was instituted, recited the fact that it was made upon "all the papers and proceedings herein," and the order appealed from recited the order to show cause. Hence the complaint in the action must be assumed to have been before the Court, and in the complaint interest was demanded from appropriate dates.

Thus, such interest was as much a part of plaintiff's claim as any other item constituting it, and the claim standing undisputed, he was entitled to interest as of absolute right. It was, therefore, not to be disallowed, "however commendable the motive of the denial" (*Peetsch v. Quinn*, 7 *Misc. R.* 6; *Sibley v. Ins. Co.*, 15 *Civ. Pro. R.* 316), and in this regard the order is not to be supported. Failing the adverse claim, there was no further question but that defendant's motion for interpleader could not prevail, it having accepted the claimant's withdrawal, and abandoned the prosecution of the motion upon the original ground.

The action was one at common law for the recovery of a sum certain and no counterclaim had been interposed. The Court could not of its own motion order a discontinuance (*Wilson v. Daggatt*, 15 *N. Y. Weekly Dig.* 208), nor do we find any grounds for the granting of the defendant's motion without the imposition of costs as a condition thereto.

The costs provided by statute are awarded upon principles of natural justice, that he who has by his resistance subjected another to the expense of litigation in the enforcement of a just demand should make indemnity for the expense (*Parsons on Costs*, p. 8, sec. 5; *Report of Code Commissioners, 1848*, p. 208); and while a plaintiff has been permitted on his own motion to discontinue an action at law, without costs,

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where it appeared that the demand was not enforceable because the defendant was an infant, a bankrupt or otherwise exempt, which facts were unknown to the plaintiff when the action was instituted (*Park v. Moore*, 4 *Hill*, 592; *Smith v. Skinner*, 1 *How. Pr.* 122; *Cuyler v. Coats*, 10 *id.* 141; *Wellington v. Classon*, 18 *id.*; *Taaks v. Schmidt*, 19 *id.* 413; *Smith v. Brett*, 8 *N. Y. Weekly Dig.* 76; *Van Buren v. Fort*, 4 *Wend.* 209; *Arnoux v. Steinbrenner*, 1 *Paige*, 82; *Phoenix v. Hill*, 3 *Johns.* 249), or where, since the action was commenced, a change in the law exempted the defendant from liability (*Gale v. Wells*, 7 *How. Pr.* 191; *Porter v. Jones*, *id.* 192), no precedent is to be found for the enforced discontinuance of an action without the payment of costs upon the application of a defendant confessedly liable for the demand in suit.\*

Assuming, therefore, that there is some discretion which may be exercised by the Court where the plaintiff applies for leave to discontinue an action without costs, in the instances ruled upon in the cases above cited, it remains that the facts here appearing afford no justification for the order appealed from, and an arbitrary denial of costs is within the province of the General Term to review (*Clafin v. Robertson*, 23 *N. Y. St. Rep.* 305).

In this case the plaintiff was in no way in fault, the institution of the action being necessitated by the defendant's failure to pay its just debt. So far as appears the plaintiff was entitled to recovery and to the accrued costs as of course (*Code Civ. Pro.* § 3228,

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\* In *Miller v. DePeyster*, 1 *Abb.* 234, *N. Y. Supr.*, on a bill of interpleader, the unsuccessful claimant was adjudged to pay all costs recovered by plaintiff, and all costs of his co-defendant, both on the bill and in an action at law between the claimants.

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*Peetsch v. Quinn.*

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subd. 4). Obviously the action was not converted into an equitable one, in which the costs are in the discretion of the Court (§ 3230), since the motion for interpleader was not granted (*Clark v. Mosher*, 107 N. Y. 118).

The order appealed from should be reversed, with costs of this appeal and costs of the Special Term.

DALY, C. J., and PRYOR, J., concurred.

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HENRY C. L. PEETSCH, PLAINTIFF-APPELLANT, *v.*  
WILLIAM H. QUINN, DEFENDANT. *In re*  
MICHAEL H. CURRAN, RESPONDENT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,  
APRIL, 1895.

§§ 190, 1337, 3247.

*Right to charge third person with costs, by reason of beneficial interest, extends only to one prosecuting an action.*

An order of the City Court affirming an order denying a motion to charge a third person, beneficially interested, with the costs of the action, is appealable to the Court of Common Pleas, as an order affecting a substantial right and not resting in discretion. The provision of section 3247 of the Code of Civil Procedure, which gives a right to a successful litigant to charge a third party with the costs of the litigation by reason of a beneficial interest in or a transfer of the cause of action to such third party, applies only to the beneficial interest of or transfer to one prosecuting the action, not to one defending a suit, or responding to an appeal. (*Decided April, 1895.*)

Appeal from an order of the General Term of the City Court of New York, which affirmed an order de-

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nying the plaintiff's motion that Michael H. Curran, the respondent, be directed to pay the costs of the action and of the several appeals therein, as the party beneficially interested.

*Edward W. S. Johnston*, for appellant.

*Michael H. Curran*, in propria persona.

BISCHOFF, J.—This is an appeal from an order denying the plaintiff's motion that the respondent, attorney for the defendant, be directed to pay the costs of the action, as the party beneficially interested.

The trial of the cause resulted in a verdict for the plaintiff for \$49.50, and this being insufficient in amount to carry costs, the defendant obtained a judgment for \$19.12, the excess of his costs as taxed over the amount of the verdict. Owing to the error of the Trial Court in refusing the allowance of interest upon the sum recovered by the plaintiff, the judgment was reversed upon appeal to this Court and the verdict corrected by the addition of interest (*Peetsch v. Quinn*, 7 Misc. R. 6). It resulted that the plaintiff obtained a judgment for costs of the trial and appeals, together with the amount of the verdict and interest, in all \$474.79.

Defendant Quinn having died before the appeal to this Court was instituted, the respondent Curran procured his own appointment as administrator, for the purpose of responding to the appeal and protecting the judgment for costs and his interest therein as attorney.

It was claimed in the Court below, and is now contended, that he should be charged with the costs of the trial and appeals as the "party beneficially inter-

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ested," under section 3247 of the Code of Civil Procedure, in view of the fact that he alone was interested in the judgment and the event of its affirmance upon appeal.

There can be no doubt that the order is appealable to this Court (*Code Civ. Pro.* § 3191, subd. 3 ; *Giles v. Halbert*, 12 *N. Y.* 32 ; *Slauson v. Watkins*, 95 *id.* 369 ; *Wollcott v. Holcomb*, 31 *id.* 126).

That it was made upon "summary application after judgment" (*Giles v. Halbert*, *supra*) does not alter its appealability as "affecting a substantial right." True, section 1337 of the Code of Civil Procedure, defining the scope of review by the Court of Appeals of an order made upon "summary application after judgment" does not apply to appeals from the City Court to the Court of Common Pleas (§ 3192), yet the right of appeal to the Court of Appeals from such an order is not founded upon section 1337, but upon section 190, which provides for appeals from orders "affecting a substantial right and not resting in discretion" (subd. 2), and an order made "upon summary application after judgment" is particularized merely as a contemplated instance of an order "affecting a substantial right" (subd. 3 ; see, also, *Wolf v. Buttner*, 6 *Mis. R.* 119).

While we entertain the appeal, our conclusion upon the merits denies its success.

The present statute, which gives a right to a successful litigant to charge a third party with the costs of the litigation by reason of a beneficial interest in or a transfer of the cause of action to such third party, is section 3247 of the Code of Civil Procedure, a substantial re-enactment of a corresponding provision of the Revised Statutes (2 *R. S.* 649, § 44 ; 2 *Edm.* p. 515, § 47), which provision uniformly was held to apply

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only to the beneficial interest of or transfer to one prosecuting the action, not to one defending a suit (*Miller v. Adsit*, 18 Wend. 672; *Ryers v. Hodges*, 1 Hill, 646) or responding to an appeal (*Bendernagle v. Cocks*, 19 Wend. 151); and failing an expression of legislative intent that a person other than as specified shall be required to pay the successful party's costs, though he himself be no party to the record, it is not for the Courts to establish any such requirement (*Miller v. Adsit*, *supra*).

Under section 321 of the Code of Procedure it was held that one defending in the name of another could be so charged, but this was by reason of the wording of that statute, wherein there was a distinct departure from the provisions of the enactment before in force (*Wollcott v. Holcomb*, 31 N. Y., 126). The Legislature by rejecting the phraseology of the former Code and embodying that of the Revised Statutes in the enactment of section 3247 of the present Code, must clearly have intended that the law, in this aspect, should be as interpreted by the earlier decisions cited above.

But appellant contends that under his prayer for general relief the Court below should have charged Curran personally with the costs, as an attorney who wilfully and without authority has subjected his successful opponent to the expense of the litigation.

With what propriety the Court below might have granted this relief, in view of the fact that the initiative in this litigation was uninterruptedly maintained by the plaintiff, it is unnecessary to determine. The particular relief asked by the moving party was properly denied, as before shown, and while the Court had power, under the general prayer, to grant such relief as the party might have shown himself to be

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*In re New York Oxygen Co.*

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entitled to, yet its failure to grant any other relief must necessarily be taken as in the exercise of discretion, the essential facts having been disputed, and is not the subject of review here (*Van Slyke v. Hyatt*, 46 N. Y. 364).

Order affirmed, with costs.

BOOKSTAVEN, P. J., and GIEGERICH, J., concurred.

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*In re* NEW YORK OXYGEN COMPANY, FOR A  
VOLUNTARY DISSOLUTION.

SUPREME COURT, SPECIAL TERM, CHAMBERS, NEW  
YORK COUNTY, MAY, 1895.

§ 2429.

*On dissolution of corporation, actions pending against it for personal injuries, abate.*

Upon the dissolution of a corporation, actions for personal injuries pending against it, untried, abate and cannot be revived or continued against the receiver. The rule in such cases is the same as where the defendant is a natural person and the cause of action dies with the death of the tortfeasor.

(Decided May 2, 1895.)

Application for voluntary dissolution of a corporation.

*Cary & Whitridge*, for the motion.

BREKMAN, J.—It is quite plain that, upon the dissolution of a corporation, actions for personal injuries pending against it, untried, abate and cannot be re-



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*In re New York Oxygen Co.*

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vived or continued against the receiver. The rule in such cases is the same as where the defendant is a natural person and the cause of action dies with the death of the tortfeasor (*Grafton v. Union Ferry Co.*, 46 *N. Y. St. Rep.* 549; *Sturges v. Vanderbilt*, 73 *N. Y.* 384; *McCulloch v. Norwood*, 58 *N. Y.* 562). By chapter 295 of the Laws of 1832 it was provided that any suit or proceeding against a corporation which shall have been dissolved, might be continued by the Court until final judgment, with like effect upon the rights of the parties as if such corporation had not been dissolved. Whether or not this provision should be construed to extend to causes of action *ex delicto*, it is now useless to consider, as it was repealed by chapter 245 of the Laws of 1880, and no substitute for it has been enacted. As the law now stands, the dissolution of a corporation apparently defeats all causes of action against it, however meritorious, which die with the person. This seems to be a serious defect and calls for remedial legislation. Whatever may be the reason for the law, if there be any reasonableness about it, which limits the life of the cause of action to that of the wrongdoer, where the latter is a natural person, it is plain that, in the nature of things, such reason can apply with little, if any, force to the case of a corporation which dies only in a figurative sense. Still, we must take the law as it is, and while I feel most reluctant to do so, I am still of the opinion that I am bound to make the order of dissolution notwithstanding its destructive effect upon the pending action against the corporation to recover damages for personal injuries. Section 2429 of the Code of Civil Procedure provides that, upon an application for a final order dissolving the corporation, if it appears to the Court that the corporation is insolvent, the Court must

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Trimble v. Kilgannon.

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make a final order dissolving the corporation and appointing one or more receivers. The report of the referee, to which no exceptions have been filed, contains a finding of insolvency which seems to be sustained by the proofs. Under such circumstances, the mandatory character of the section apparently leaves the Court no option but to grant the order applied for.

Motion granted.

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TRIMBLE v. KILGANNON.

NEW YORK SUPERIOR COURT, SPECIAL TERM, MAY,  
1895.

§§ 458, 3268.

*Infant plaintiff, suing as poor person, need not give security for costs.*

Section 458 of the Code of Civil Procedure, providing "that a poor person, not being of ability to sue, may apply by petition to the Court for leave to prosecute as a poor person," applies to infants as well as adults.

An infant plaintiff, suing by her guardian, *ad litem*, may prosecute an action *in forma pauperis* without giving security for costs. (Decided May 2, 1895.)

Motion by plaintiff for leave to sue as a poor person in an action to recover damages for a breach of promise to marry.

*Howe & Hummel*, for plaintiff.

*Louis J. Grant*, for defendant.

GILDERSLEEVE, J.—The action is brought to recover damages for a breach of promise to marry. The

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Trimble v. Kilgannon.

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plaintiff is an infant, under the age of twenty-one, and sues by her guardian *ad litem*. The defendant makes a motion for an order compelling plaintiff to give security for costs, on the ground that she is an infant whose guardian *ad litem* has not given such security (see Code, § 3268, subd. 5). At the same time, the plaintiff makes a motion, under section 458 of the Code, for leave to sue as a poor person. There can be no question that section 458 of the Code, providing "that a poor person, not being of ability to sue, may apply, by petition, to the Court for leave to prosecute as a poor person," applies to infants as well as adults (see Tobias v. RR. Co. 39 St. Rep. 183 ; Harris v. Life Ins. Co. 10 N. Y. Supp. 474). As it is in the discretion of the Court to allow an action to be prosecuted *in forma pauperis*, an infant plaintiff, suing by her guardian *ad litem*, may be permitted to sue in such form, in spite of the provisions of § 3268 of the Code, subd. 5, to the effect that defendant, in such case, may require security for costs (see Harris v. Life Ins. Co. *supra*). These two motions are made at the same time, and the facts necessary to justify each of the orders asked for are shown. In such case, it seems to me that the motion for leave to prosecute *in forma pauperis* should be granted, and the motion for security for costs should be denied (see Hotaling v. McKenzie, 7 Civ. Pro. R. 320).

No costs of motion.

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Zelmanovitz v. The Manhattan Railway Co.

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LEOPOLD ZELMANOVITZ v. THE MANHATTAN  
RAILWAY COMPANY.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
FEBRUARY, 1891.

§ 3256.

*Disbursements—what are “necessary” and “reasonable”—copy of stenographer’s minutes of testimony taken on former trial, for use upon a subsequent trial.*

Disbursements for stenographer’s minutes of testimony taken upon a former trial for use upon a subsequent trial may be taxed as “reasonable” under section 3256 of the Code of Civil Procedure. The tendency is to hold that to be reasonable as a disbursement which is useful and convenient, and which prudence would suggest as requisite in the way of preparation.

Costs, after notice of trial and before trial should be taxed upon a second trial after the disagreement of the jury upon the first trial.

(Decided February, 1891.)

Motion for taxation of costs.

*Isaac N. Falk*, for plaintiff.

*Davies & Rapallo*, for defendant.

DALY, C. J.—Under the former Code of Procedure, allowing the taxation of only such disbursements as were “necessary,” it was generally held that the expense of a copy of the stenographer’s minutes of a former trial, procured for use upon the second trial, could not be taxed (*Hamilton v. Butler*, 30 *Hun*, 36; *Robertson, J.*; same case, 19 *Abb.* 446), although it was subsequently determined that it might be. (*Flood*

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Zelmanovitz v. The Manhattan Railway Co.

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v. Moore, 2 *Abb. N. C.* 91; Westbrook, J.) In the first case it was said that they were "very useful," but not a necessary disbursement. In the second case it was said that the allowance of the disbursement stood upon the same ground as the expense of subpoenaing witnesses to testify to what other witnesses swore to on the first trial.

The present Code allows "reasonable" as well as "necessary" disbursements; and under that category this disbursement might with propriety be claimed. Under the old Code, the expense of the stenographer's minutes, procured in order to propose amendments to a case, were at one time allowed (*Sebley v. Nichols*, 32 *How.* 182, *N. Y. G. T.*), and afterwards in another case disallowed (*The Pflander Co. v. Sargent*, 43 *Hun.* 154, *G. T. 5th Dept.*) Since the new Code such a disbursement has been considered as reasonable when taxed as disbursements of appeal (*Stevens v. N. Y. Elevated R. R.* 31 *State R.* 404). The tendency is to hold that to be "reasonable" as a disbursement which is useful and convenient, and which prudence would suggest as requisite in the way of preparation. A copy of the stenographer's minutes of the evidence upon a former trial for use upon a subsequent trial would come under that head. The disbursement should, therefore, be allowed.

Costs after notice of trial and before trial should be taxed upon a second trial after the disagreement of the jury upon the first trial (*Spring v. Day*, 44 *Hun.* 390).

Sheriff's execution fees should be allowed, \$1.50 under the act of 1890 (chap. 523, § 17, sub. 6).

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Kummer v. The Christopher and Tenth Street Railroad Co.

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CHARLES KUMMER v. THE CHRISTOPHER  
AND TENTH STREET RAILROAD COMPANY.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
MAY, 1895.

§ 3251.

*Costs—on new trial.*

In taxing the costs for a new trial which has resulted from a reversal of a judgment and an order granting such new trial, twenty-five dollars is properly allowed under section 3251, subd. 3, Code of Civil Procedure, and where such sum has been taxed for costs after the granting of and before a new trial, no allowance can be made in the same trial for costs after notice of trial.

(Decided May, 1895.)

Motion for a new taxation of costs.

*Herbert T. Ketcham*, for plaintiff.

*Merrill & Rogers*, for defendant.

GIEGERICH, J.—Upon further consideration I am convinced that I erred, upon a former motion for a new taxation of costs in this case, in allowing fifteen dollars for services after notice of trial and before trial. Such an allowance should not be made in the case of a new trial granted upon an order. The case of *Spring v. Day*, (44 *How. Pr.* 390), followed by Chief Judge Daly in *Zelmanovitz v. The Manhattan RR. Co.* (*N. Y. Law Journal*, Feb. 13, 1891; s. c. page 402, *ante*), is authority for such a charge in the case of a new trial, resulting from a disagreement of the jury, but does not present the question of the proper prac-

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Kummer v. The Christopher and Tenth Street Railroad Co.

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tice in taxation for a new trial which has resulted from a reversal of a judgment and an order granting such new trial. I do not think, however, that the Code of Civil Procedure leaves any doubt as to the proper taxation under such circumstances. Section 3251, subd. 3, awards costs "to either party: For all proceedings after notice of trial, and before trial, *except as otherwise prescribed in this article*, fifteen dollars." The different provision, indicated by the words which I have put in italics, is found below in the same subdivision, and is as follows: "Where a new trial is had, pursuant to an order granting the same, for all proceedings after the granting of, and before the new trial, twenty-five dollars." I think it clear that the last provision operates to the exclusion of the former, and that where twenty-five dollars have been taxed for costs, after the granting of and before a new trial, no allowance can be made in the same trial for costs after notice of trial. Since the matter was last before me there has been a second reversal and a second new trial has been ordered. It follows, therefore, as there have been two new trials granted in the case for which fifty dollars were properly taxed as costs, after the granting of and before such new trials, that the item of sixty dollars for costs after notice of trial for four trials should be reduced to thirty dollars. The remaining thirty dollars of the item is proper, being made up of fifteen dollars for costs after notice of trial of the first trial and fifteen dollars costs after notice of trial of the trial which was made necessary by a disagreement of the jury. The payment of the costs and disbursements of a former trial was imposed upon the appellant as a condition to the granting of a new trial, which was granted, it seems, as a matter of favor, no available exceptions or errors of

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DeWitt v. Gunn.

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law appearing in the record on appeal. The principle applied in cases of similar indulgences in opening defaults (*Lennon v. MacIntosh*, 19 *Abb. N. C.* 175) and in allowing amendments (*Cohen v. Husson*, 13 *Daly*, 334; *Star Cash Co. v. Reinhardt*, 6 *Misc.*, 365, 56 *St. Rep.* 404, 26 *N. Y. Suppl.* 746) affords ground for a like decision in this case. I think that the successful party is entitled in such cases to tax the costs, although they have already been once allowed and paid to him as a recompense for the favor granted to his adversary. It follows that the clerk's taxation of the costs and disbursements, paid as aforesaid, was proper; and consequently the same should not be deducted from plaintiff's bill of costs. *Zelmanovitz v. The Manhattan Railway Co.* (*supra*) is an express adjudication that disbursements for stenographer's minutes of testimony upon a former trial for use upon a subsequent trial may be taxed. The plaintiff's attorney makes affidavit that the transcript was necessary for use and was used upon the two succeeding trials. The charge therefore of five dollars and sixty cents is not unreasonably large, and therefore should be allowed.

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DEWITT v. GUNN.

NEW YORK SUPERIOR COURT, SPECIAL TERM,  
MAY, 1895.

§ 2285.

*Punishment for contempt—fine limited to actual injury.*

Upon an application to punish a defendant for contempt in not appearing and submitting to an examination pursuant to an ad-



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DeWitt v. Gunn.

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journalment had in supplementary proceedings, the proposed order must limit the fine to the actual injury, i. e., \$30 costs of the supplementary proceedings.

(Decided May, 1895.)

Motion for order to punish defendant for contempt.

*Martin & Smith*, for the application.

MCADAM, J.—The application is to punish the defendant for contempt in not appearing and submitting to an examination pursuant to an adjournment had in supplementary proceedings. The proposed order fines the defendant the entire amount of the judgment (\$512.50) and directs his imprisonment till the payment of the fine. Section 2285 of the Code provides that “Where the misconduct proved consists of an omission to perform an act or duty which it is yet in the power of the defendant to perform, he shall be imprisoned only until he has performed it”; and the fine is limited to the actual injury (26 *St. Rep.* 243; 50 *Hun*, 243). Counsel will therefore amend the order by fining the defendant \$30, the costs of the supplementary proceedings, and directing his imprisonment until he pays said fine and submits to the required examination.

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Olifiers v. Belmont.

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OLIFIERS v. BELMONT, *et al.*NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
MAY, 1895.

§§ 1010, 1021, 3229.

*Costs of course—on sustaining demurrer.*

Where a demurrer to an entire complaint in a common law action is sustained, the right of the defendant to costs is absolute; and in actions at law, where all of the defendants have succeeded upon the trial, those not united in interest, who have appeared by different attorneys, are entitled to costs of course, and as a right.

It is not necessary, under the provisions of the Code of Civil Procedure relative to decisions upon demurrers (sections 1010, 1021) for the court to make separate and formal conclusions of law, but a simple statement indicating the disposition made of the demurrer is sufficient.

(Decided May, 1895.)

Demurrer to complaint. Separate bills of costs allowed to defendants.

*Leavitt, Wood & Keith*, for plaintiff.

*Bowers & Sands*, for defendants.

GIEGERICH, J.—Where a demurrer to an entire complaint in a common law action is sustained, the right of the defendant to costs is absolute (*Tallman v. Bernhard*, 75 *Hun.* 30; 58 *St. Rep.* 597; 27 *Supp.* 6; 31 *Abb. N. C.* 84; 23 *Civ. Pro.* 284), and in actions at law, where all of the defendants have succeeded upon the trial, those not united in interest, who have appeared by different attorneys, are entitled to costs of course, and as a right (*D., L. & W. Ry Co. v. Burk-*

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Nicoll v. Palmer.

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ard, 40 *Hun*, 625 ; *Vane v. Van Orden*, 11 *Abb. N. C.* 228, 63 *How. Pr.* 237). I do not therefore think I have any power to direct that only one bill of costs be allowed. Besides, I doubt if such power ought, if it existed, to be exercised in the present case when the defendants Belmont and Chandler appeared by separate attorneys, who both submitted elaborate briefs. While I do not consider it necessary, under the provisions of the Code of Civil Procedure relative to decisions upon demurrers, viz., sections 1010 and 1021, for the Court to make separate and formal conclusions of law (*Rumsey's Practice*, Vol. II. p. 234), as distinguished from a simple statement indicating the disposition made of the demurrer, I see no objection to such a practice, although it is unusual, and accordingly sign the decisions as proposed by the respective defendants, Belmont and Chandler.

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NICOLL v. PALMER, *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,  
MAY, 1895.

## § 3216.

*Removal of cause—who may make application—undertaking.*

On an application to remove a cause from the District Court to the Court of Common Pleas, under section 3216 of the Code of Civil Procedure, it is sufficient if the application be made by the sole defendant who was served with the summons and who appeared in the action, but the undertaking for removal must recite the facts as they exist.

(*Decided May, 1895.*)

Motion by plaintiff for an order remanding the cause back to the District Court.

*William C. Timm*, for plaintiff.

*Murphey & Metcalf*, for defendant.

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Nicoll v. Palmer.

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DALY, C. J.—Motion by plaintiff for an order remanding this cause back to the District Court, from which it was removed on the application of one of the defendants, Eddy Palmer, under section 3216 of the Code. That section provides that the defendant in an action where the damage claimed exceeds one hundred dollars, after issue is joined and before an adjournment has been granted upon his application, may apply to the Justice of the Court in which the action is brought, for an order removing the action into the Court of Common Pleas; and that such order must be granted upon the defendant's filing with the clerk an undertaking to pay the amount of any judgment that may be recovered against him in the latter Court. In this case Eddy Palmer was the only defendant served with the summons, and the only one who appeared before the Justice and made application for removal to this Court. Such application was granted upon his filing an undertaking reciting appearance of the defendants, the joining of issue by them and application by them for removal. It is now contended by the plaintiff that the cause was improperly removed; first, because the application for removal was not made by both defendants; second, if properly made by one defendant the undertaking is irregular in not reciting that fact. There seems to be no difficulty in holding that in a case like the present the application for removal may be made by the sole defendant who was served with the summons and who appeared in the action. The plaintiff cannot complain that the defendant whom he did not serve nor bring into Court did not join in the application. As between the plaintiff and the defendant served, the latter was the sole defendant before the Court at the return of the summons. If his co-defendant was jointly liable

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White v. Goodson Type Casting and Setting Machine Co.

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with him, the joint liability is not affected by the removal. If we were to hold otherwise, a defendant, without fault on his part might be deprived of the right of removal, because his co-defendant could not be found in the jurisdiction or service upon him was intentionally omitted. But, while the Justice had power to remove this cause upon the application of the defendant who was served and who appeared, the undertaking for removal should have recited the facts as they existed. This undertaking incorrectly states that the defendants appeared and joined issue and applied for the removal, and such recital may affect the liability of the surety upon the undertaking. We have the power, however, to remand the undertaking to the Justice for the purpose of amendment. (*Levy v. Scheringer*, 19 *Civ. Pro. R.* 346), and an order therefor will be made. Upon the execution of the amended undertaking, it must be returned to this Court, and the Court will proceed in the action.

Motion granted for this purpose only, and otherwise denied, without costs to either party.

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WHITE v. GOODSON TYPE CASTING AND SETTING MACHINE COMPANY.

SUPREME COURT, SPECIAL TERM, CHAMBERS, NEW YORK COUNTY, MAY, 1895.

§ 637.

*Attachment—damages must be definite and certain.*

An attachment will not be granted in a suit against a foreign corporation where the amount of the damages claimed is indefinite

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White v. Goodson Type Casting and Setting Machine Co.

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and uncertain, and incapable of ascertainment upon the face of the papers.

(Decided May, 1895.)

Motion to vacate an attachment.

*Charles M. Ingraham*, for plaintiff.

*Steele & Dickson*, for defendant.

BREKMAN, J.—This motion is made to vacate an attachment granted against the defendant as a foreign corporation, on the ground that the damages are indefinite and uncertain and incapable of ascertainment upon the face of the papers. The plaintiffs sue to recover commissions on the sale by them of the stock of the defendant. There was no agreement as to the amount of their compensation. They sue, therefore, to recover the reasonable value of their services, and allege that the customary charge or commission for such services is twenty per cent. upon the cash value of the stock. In the complaint this averment is made on information and belief. In the affidavit, which is made by one of the plaintiffs, the averment is made on his belief only. Nowhere do the papers disclose the sources of information upon which any such belief is predicated, nor is there any affidavit, on the part of any one qualified to testify to the fact, that such a commission is either customary or reasonable. The percentage seems to be so exorbitant and unreasonable as to furnish the Court with no measure of value, from which it may be reasonably inferred that, if the plaintiffs should establish their right to recover, the jury would award them the amount they claim, or anything in any way approaching it. The case, therefore, is one which, in my opinion, comes within the

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*In re Murphy's Will.*

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decisions denying the right of a party to an attachment, in cases where, upon the papers, the amount of the damages is largely conjectural. For this reason the attachment should be vacated. I do not think, either, that when the defendant moved for an increase of security on the part of the plaintiffs, it exhausted its right to make any further motion under section 682 of the Code.

Order signed.

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*In re MURPHY'S WILL.*

SUPREME COURT, GENERAL TERM, FIFTH DEPARTMENT,  
APRIL, 1895.

§ 836.

*Testimony of physician—waiver—by whom made.*

Under section 836 of the Code of Civil Procedure, as amended in 1893, providing that a physician's testimony as to the mental or physical condition of his deceased patient, based on information gained in his professional capacity, may be admitted, when the validity of the last will and testament of the deceased is in question, and the provisions of section 834 have been expressly waived by the executor, husband, widow, heir-at-law, next of kin, or any other party in interest; it is not necessary that all persons coming within the relations there mentioned should unite to create the waiver, but any one of the persons so named may do so.

(Decided April, 1895.)

Appeal from Surrogate's Court, Niagara County.

Proceeding for the probate of the will of John Murphy, deceased.

The will was admitted to probate, and nineteen of the heirs and next of kin of testator appeal.

*P. F. King & Charles Hickey*, for appellants.

*E. J. Taylor & John E. Pound*, for respondents.

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*In re* Murphy's Will.

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BRADLEY, J.—On December 20, 1892, the decedent was a resident of the City of Lockport, N. Y. He had reached the age of 87 years. He had become feeble, and was confined to his bed. His property—mostly personal—amounted to about \$25,000. He had been twice married, and was a widower; had no children living. He was survived by grandchildren, a sister, and nephews and nieces. On the morning of that day his attendants, thinking he was in a dying condition, sent for the priest, who came; and, after an interview with Murphy, he went out, and shortly after returned with a lawyer. The will was then drawn, persons were called to subscribe it as witnesses, and the will was executed. By it he gave to St. Patrick's Roman Catholic Church, of Lockport, \$1,000; to his nephew, William Murphy, \$1,000; to his nephews and nieces James Horton, John Horton, Samuel Horton, Nicholas Horton, Sarah Horton, and Ellen Horton, \$500 each; to his nephew James Keely, a house and lot; to Luke Mullett, about \$2,500, by abatement of that amount of his bond and mortgage held by the decedent; and to the Right Reverend Stephen V. Ryan, of Buffalo, N. Y., all the rest, residue, and remainder of his estate. And he appointed Rev. Patrick J. Cannon, the priest before mentioned, and Michael Mullett, as executors of the will. It is urged on the part of the contestants: (1) That Murphy was incompetent to make a will; and (2) that it was the product of undue influence.

He had formerly been an active, vigorous man. But for about twelve years before his death he had been more slovenly in his personal habits, and somewhat secluded. He had a severe sickness about one year before his death, and afterwards, about three weeks before his death, he was, by illness, confined to his



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*In re Murphy's Will*

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bed, and so continued until his death, December 28, 1892. There was much evidence given on the part of the contestants relating to his appearance, conduct, and habits during the last year of his life, and to his appearance during his last illness, tending to prove his indifference to matters to which his attention was called, and a failure to recognize his intimate friends and acquaintances, and other circumstances bearing upon his apparent mental condition, from which the inference was permitted that at the time the will was made he was not capable of comprehending the condition of his property, and his relations to those who might become the objects of his bounty, and the scope and bearing of the provisions of his will. His condition had become alarming to his attendants when the priest was sent for. This was done without his knowledge. The priest came, and after remaining alone with Murphy for some time, departed, and soon after returned with a lawyer, by whom the will was drawn in the presence only of the priest and the decedent. Then the subscribing witnesses were called in, and the will was, in due form executed. In view of these facts, and of the provisions of the will, it is urged, in addition to the charge of mental incompetency of Murphy, that it was the result of undue influence upon him.

The evidence of what took place relating to the will before and at the time it was drawn is in the evidence of the priest only, and is to the effect that Murphy requested him to draw his will. He declined, saying he would get a lawyer. He did so, and when he returned with the lawyer the priest suggested to Murphy that it would be proper for him to leave something to the church, and the latter concluded to give \$1,000 to it. Thereupon, inquiring to whom he wished to leave

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*In re Murphy's Will.*

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other portions of his property, he proceeded to give the names of those to whom specific legacies were given. Then, being asked what he wanted to do with the rest of his estate, he said to the priest, "Take it, and do what you like with it"; that "he did not know what he would do with it." The priest said that would not do, he did not want it, and finally suggested that he could leave it to the bishop, to which he consented, and the residuary clause to that effect was added. The evidence of the priest is to the effect that the provisions of the will were the result of voluntary action and direction of Murphy; that he expressed a desire to give the residue of his estate to some charitable purpose, and on the suggestion of the priest, who advised him that it was probably too late for that, in view of the short time he might live, he made the bishop, with whom he had no personal acquaintance, the residuary legatee. His securities and money, which constituted the most of his estate, were, by his direction, handed over to and taken by the priest, into his possession, shortly after the will was executed; and there is some evidence of Murphy's subsequent declaration in recognition of the will, and tending to indicate his understanding of its provisions. The fact that none of his four grandchildren had any consideration by his will may not be so remarkable as it would seem if his relations with them had been intimate. They were the children of the issue of his first marriage in Canada. He there separated from his wife, and came into this State, and never after cohabited with her; nor, so far as appears, did he have any communication with her, or with the children or grandchildren. He, for some time prior to his last sickness, had been very penurious in his habits; so much so, that he had denied to himself the comforts

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*In re Murphy's Will.*

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of life, although he had money, and available productive securities. At the time he made the will, he evidently was very sick. He previously, and on that day, suffered much pain. And it may be that he had then become satisfied or apprehensive that his continued life would be brief. This may account somewhat for his willingness or desire that his assets be taken by the priest into his possession. It does not appear that he had ever before made any will, or expressed any desire, about the ultimate disposition or distribution of his property. And it may be that, but for the suggestion then made to him upon the subject, no will would have been executed. It is also urged as improbable that Murphy intelligently placed in the priest the confidence indicated by the will, and by handing the property over to him, because, as there is evidence tending to prove Murphy had not, for some years, manifested any interest in the church, and had spoken in terms harshly and derogatory of him. The significance of his remarks referred to is dependent upon the circumstances under which they were made, and which do not very clearly appear. Upon the evidence, as a whole, the question was one of fact, whether the will, as made, voluntarily expressed the intelligent purpose of the deceased.

On the part of the contestants, Thomas B. Cosford, a practicing physician and surgeon, of some years' experience, was called as a witness, and testified that he professionally attended Murphy from the 8th day of December, 1892, until his death. Thereupon the heirs and next of kin of the decedent waived the provisions of section 834 of the Code of Civil Procedure, so far as they were applicable to the witness, and offered to prove by him that from the time he commenced attending him, on December 8, 1892, to the

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*In re Murphy's Will.*

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time of his death, on the 28th of that month, he was continuously delirious, and of unsound mind, and incompetent to make a will. The evidence so offered was excluded upon the objection of the proponents, who were the persons named as executors in the will, and exception was taken. Prior to the amendment of 1893 of section 836 of the Code, the objection would have been well taken. *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320; *In re Coleman's will*, 111 N. Y. 220, 19 N. E. 71. The amendment took effect fifteen days before the evidence was offered, and, as amended, the section contains the following provisions:

“But a physician or surgeon may, upon a trial or examination, disclose any information as to the mental or physical condition of the patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to degrade the memory of the patient, when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question by the executor or executors named in said will or the surviving husband, widow or any heir-at-law or any of the next of kin of such deceased or any other party in interest.”  
—*Code Civ. Pro.* § 836.

The amendment of 1893 had relation only to such waiver when the validity of the last will and testament of a decedent is in question. Before then, in such case, the right of waiver was solely with the executors named in the will. It is now urged on the part of the proponents that it was the legislative intent that all persons coming within the relations there mentioned should unite to create the waiver, and therefore the

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*In re Murphy's Will.*

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word "or" should be treated as "and," for the purposes of the interpretation of the amendment. It cannot reasonably be so construed. The purpose of the amendment evidently was to open more widely the door to the introduction of the evidence of medical attendants of a deceased patient, when the validity of his will should be in question. The right of waiver was therefore extended to others having the relations mentioned to the deceased, and to those having the legal relation of parties in interest, and who are properly in the action or proceeding in which the question arises before the Court. There is no question of public policy, recognized at common law, involved. The restriction, so far as it exists, in such case, is statutory only. 1 *Greenl. Ev.* § 248. *Rex v. Gibbons*, 1 *Car. & P.* 97. It follows that the exclusion of the evidence of the doctor thus offered was error. And, as the contestants may have been prejudiced by its exclusion the decree of the Surrogate's Court must be reversed, and a new trial granted, with costs of this appeal payable out of the estate, to abide the event. And, as the evidence presents questions of fact, such new trial should be had at the Circuit Court of Niagara County of the questions: (1) Did the decedent John Murphy at the time of the execution of the will, on the 20th day of December, 1892, have testamentary capacity? (2) Was the instrument purporting to be the last will and testament of the decedent voluntarily made by him? (3) Was the execution by the said decedent of the instrument purporting to be his last will and testament of date December 20, 1892, procured by fraud, circumvention, or undue influence practiced upon him?

All concur.

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Maurhoffer v. Mitnacht.

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THERESE MAURHOFFER v. JACOB A. MITT-  
NACHT.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,  
MAY, 1895.

§ 379.

*Rights of mortgagee in possession of mortgaged premises.*

A person receiving an assignment of a mortgage and then entering into possession of the mortgaged premises, cannot be said to have entered into such possession adversely to the mortgagor, unless he at the same time qualifies his taking possession by some visible and notorious act in hostility to the title of the mortgagor showing that such possession is adverse to the mortgagor, and not as mortgagee.

Such an assignment is decisive that the mortgage is redeemable at its date and although the mortgagor was not a party to the assignment, he can avail himself of the evidence which they afford of the nature of the mortgagee's interest and claim.

Prior to the enactment of section 879 of the Code of Civil Procedure, it seems to have been held in this State that the Statute of Limitations would never run against an action to redeem while a mortgagee held possession of the premises avowedly as mortgagee, but would commence to run when the mortgagee entered into possession claiming the entire fee; and that the mortgagor must commence his action to redeem within ten years from the time that the mortgagee entered into possession claiming the entire fee under a deed which purported to convey the fee to him.

(Decided May, 1895.)

Action to redeem from mortgage.

The facts are stated in the opinion.

A. H. Alker, for plaintiff.

H. M. Gescheidt, and H. A. Frost, for defendant.

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Maurhoffer v. Mittnacht.

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INGRAHAM, J.—The action is commenced by plaintiff, claiming to be the owner of a lot of land, against the defendant, alleged to be a mortgagee in possession to redeem from the mortgage. The mortgage was executed on February 14th, 1867, and the property was conveyed by the mortgagor to this plaintiff by a deed dated April 9th, 1868, subject to the mortgage. The mortgage having been assigned to Catherine McCown and Bridget McCown on April 7th, 1870, an action to foreclose the mortgage was commenced; and on May 21st, 1870, the McCowns assigned the mortgage to George M. Mittnacht, and the foreclosure action was abandoned. Immediately thereafter, it would appear, Mittnacht entered into possession of the mortgaged premises and remained in such possession until 1874, when he assigned the mortgage to this defendant by an assignment dated June 16, 1874, which was duly recorded; and under that assignment the defendant continued in possession of the mortgaged premises down to the commencement of this action.

The sole question to be determined is whether this right to redeem is barred by the Statute of Limitations. In England the rule seems to have been that the action is too late unless brought within twenty years after the mortgagee entered into possession, unless some act of his is shown which treated the mortgage as a mortgage (see *Healy v. Hodle*, 1 *Vesey & Beams*, 538; *Grubb v. Woodhouse*, *Freman*, 187). In this State I cannot find that this precise question has been passed upon.

The exact relation of a mortgagee in possession to the title of the mortgaged premises has, however, been much discussed, and many able Judges have differed. It seems to have been finally settled, however, that a mortgagee in possession is not the owner of the legal

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title to the land covered by the mortgage. In *Trim v. Marsh* (54 N. Y. 599) it was held that the interest of a mortgagor in mortgaged premises in possession of a mortgagee was real estate that could be levied upon and sold under an execution, and that upon a conveyance by the Sheriff under such a sale to the mortgagee of the right, title and interest of the mortgagor in and to the mortgaged property, the legal and equitable title to the property becomes vested in the mortgagee. And Earl, C., thus described the relation of the mortgagee to the property :

‘Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor’s title is still a legal one, with all the incidents of a legal title, subject to the pledge, and the mortgagee’s interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor’s title would go to his heirs. Payment, or even tender, would destroy the mortgagee’s right to retain possession and would enable the mortgagor to maintain ejectment to recover possession. The mortgagee in such case, so far from having any title, holds the land as the land of the mortgagor and is liable to account to him for the rents and profits.’ Commissioner Reynolds also delivered an opinion concurring with Commissioner Earl, and this decision was in the face of a strong dissenting opinion from Commissioner Gray.

The defendant, therefore, has not a legal title to the property ; that is still vested in the plaintiff. A mortgagee in possession, however, is entitled to main-



tain possession of the mortgaged premises as against the mortgagor, and the aid of equity is necessary for the plaintiff to remove the lien of the mortgage before she can recover possession. As was intimated in *Trim v. Marsh (supra)*, the mortgagor has the right to pay the amount due upon the mortgage when that is known or can be ascertained without any aid of a Court of equity, or the mortgagor can come into a Court of equity and ask that the amount due on the mortgage be ascertained, and when paid he be adjudged to be entitled to the mortgaged premises. The question as to when the statute commenced to run when the mortgagee entered into possession claiming to own the fee has also been settled.

The case of *Miner v. Beekman* (50 N. Y. 337) was an action to redeem where there had been an attempted foreclosure of the mortgaged premises, which was without jurisdiction as against the owner of the fee, but where there had been a sale in the action and the purchaser had entered into possession of the premises under the deed, claiming title to the property. It was held in that case that such purchaser held adversely to the mortgagor; that the cause of action accrued when such purchaser went into possession under the deed, and that under the Code of Procedure then in force, a right of action to redeem was barred after ten years from the entry of the mortgagee into possession under the deed. A distinction is there taken between a case where a mortgagee enters into possession under an independent conveyance, which upon its face conveys the entire title to the property, and where a mortgagee enters into possession avowedly as mortgagee, making no claim except that of a mortgagee in possession. And Grover, J., in delivering the opinion of the Court in that case, in which all the Judges con-

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curred, said : "The statute, I think, would not commence running had the defendants or their grantor entered and continued in possession avowedly as mortgagees, and would not run while they so held, for the reason that it is a continuing right of the owner to pay off and discharge a mortgage, and by so doing regain possession of the land. But so far as appears in this case, neither the defendants nor their grantor so entered and held the possession, but on the contrary claimed the entire fee, under deeds in fee, commencing with the deeds of a Master in Chancery given upon a sale made in an action for the foreclosure of the mortgage in question to the purchaser."

And in the case of *Hubbell v. Sibley* (50 N. Y. 470) the same principle was restated and the same distinction taken between a case in which a mortgagee enters into possession of property as mortgagee and where he enters into possession under a conveyance purporting to convey to him the absolute title to the premises.

Thus prior to the enactment of section 379 of the Code of Civil Procedure hereafter referred to, it seems to have been held in this State that the Statute of Limitations would never run against an action to redeem while a mortgagee held possession of the premises avowedly as mortgagee, but would commence to run when the mortgagee entered into possession, claiming the entire fee ; and that the mortgagor must commence his action to redeem within ten years from the time that the mortgagee entered into possession claiming the entire fee under a deed which purported to convey the fee to him. That being the law section 379 of the Code of Civil Procedure went into effect.

Sec. 379. "An action to redeem real property from a mortgage, with or without an account of rents

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and profits, may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage, or the nonfulfillment of a covenant therein contained." The language is general, and is only limited by the provision of the section, that such an action may be maintained unless the mortgagee has "continuously maintained an adverse possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage."

This action can therefore be maintained, unless it is shown that this qualification of the right contained in section 379 exists.

George M. Mittnacht received an assignment of the mortgage on May 21st, 1870, and under that assignment he went into possession. No deed is produced or proved giving to him any other interest or title in the property except as mortgagee. There is evidence of some conversation between him and the owner of the property prior to his acquiring the mortgage, but I do not think that anything that was said qualifies the interest or title of the mortgagee in the premises, or the possession which he thus acquired. He continued in such possession for four years, when he transferred the possession to the defendant, and with that transfer he executed, not a conveyance of the property, not a deed which purported to convey the fee of the property, but simply an assignment of the mortgage; and under that assignment of the mortgage to the defendant, the defendant went into possession and has continued in such possession. That assignment was dated and recorded in 1874, and

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less than twenty years prior to the commencement of this action.

It seems to me clear that a person receiving an assignment of a mortgage, as this defendant did in 1874, and then entering into possession of the mortgaged premises, cannot be said to have entered into such possession adversely to the mortgagor, unless he at the same time qualifies his taking possession by some visible and notorious act in hostility to the title of the mortgagor showing that such possession is adverse to the mortgagor, and not as mortgagee.

In *Borst v. Boyd* (3 *Sandf. Ch.* 548) it was held that such an assignment was decisive that the mortgage was redeemable at its date, and that although the mortgagor was not a party to the assignment he could avail himself of the evidence which they afforded of the nature of the mortgagee's interest and claim, and in that case the Assistant Vice-Chancellor said: "A mortgagee may work a disseizin, but I apprehend within the period requisite for bearing redemption that can only be done by some direct, open and unequivocal act in hostility to the title of the mortgagor." It is not necessary in this action to determine upon whom the burden rests of showing the relation of the mortgagee in possession to the property. Whether twenty years' possession makes it necessary for the mortgagor to show some act of the mortgagee which recognize the existence of the mortgage, or whether the possession of the mortgagee was presumed to continue as mortgagee until, either by the existence of a deed or by some act, the possession became adverse and in hostility to the title of the mortgagor. In this case, taking the assignment of the mortgage and entering into possession under it within twenty years of the commencement of the

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action was a distinct recognizance of the position of the defendant.

It seems to me, therefore, that it has been shown that neither the defendant nor his predecessors have continuously maintained an adverse possession of the mortgaged premises for twenty years before the commencement of this action, and the plaintiff is therefore entitled to judgment.

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WARRING v. KEELER.

COUNTY COURT OF CHEMUNG COUNTY, FEBRUARY, 1895.

§ 3156.

*Service of summons by party, in justice's court.*

Under section 3156 of the Code of Civil Procedure, whereby any proper person of full age not a party to the action may serve a summons in a justice's court, if empowered to do so by the justice, service of summons by the plaintiff, although deputized by the justice is void.

The defendant need not appear before the justice, and there present his objections to his jurisdiction, but may raise the question on appeal from the judgment.

(Decided February, 1895.)

Appeal by defendant from judgment of justice's court in favor of plaintiff.

*L. E. Mosher*, for defendant, appellant.

*G. L. Smith*, for plaintiff, respondent.

TAYLOR, J.—The plaintiff and respondent on the 15th day of August, 1894, applied to L. W. Bailey, a justice of the peace of the town of Veteran in this county, for a summons against the defendant. The

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justice issued said summons, and made it returnable on the 23d day of August, at 10 o'clock in the forenoon. On the back of the summons he put the following indorsement: "Eleazar Warring is hereby authorized to serve this precept. L. W. Bailey, Justice." On the 1st day of August the plaintiff served the summons and made the usual return. The plaintiff was not a constable. The defendant did not appear, and on the return day the justice rendered judgment for the plaintiff for \$39.45 damages, and \$1 costs. The defendant has appealed from said judgment, and insists that the same is void upon the ground that the justice acquired no jurisdiction to render the same, for the reason that the plaintiff was prohibited from serving the summons under section 3156 of the Code of Civil Procedure. The section relied upon by the defendant's counsel authorizes the justice, at the request of the party, to empower, by written authority endorsed upon the mandate, any proper person of full age, not a party to the action, to serve or otherwise execute it. The fact that the plaintiff served this summons is not disputed, but the counsel for the respondent insists that he had the right to do so, having been authorized by the justice, and has referred us to the cases of *Putnam v. Man*, 3 *Wend.* 202, and *Tuttle v. Hunt*, 2 *Cow.* 436. We do not think either of the cases cited is authority. They were decided before the adoption of the present Code, prohibiting a party in a justice's court from serving a summons in his own behalf, and we are of the opinion that the statute was enacted for the purpose of abrogating the rule established by these cases. The principle decided in the case of *Putnam v. Man* was that the service of the summons could not be attacked collaterally, and the case, so far as it established that principle, has been followed,

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although criticized by Parker, J., in *Fitch v. Devlin*, 15 *Barb.* 47; but we have not been cited to a case since the adoption of the present Code, nor have we been able to find one, where the courts have held that the party to an action in a justice's court could serve his own summons, and we do not think we would be justified in declaring that the language of the section above referred to was not intended to prohibit what it expressly declares shall not be done. We are therefore of the opinion that the justice had no authority to deputize the plaintiff to serve this summons, and acquired no jurisdiction to render this judgment. The learned counsel for the respondent insisted upon the argument of this case that it was the duty of the defendant to appear before the justice, and there present his objections to his jurisdiction, and he having failed to do so, he was estopped from raising the question in this court, and to support this contention he cites cases where it has been held that if the defendant had appeared and objected the objection would have been good. We, of course, are not called upon to pass upon that question in this case. We have no inclination to dispute the proposition. The counsel for the respondent also insists that this case is controlled by the case of *Lindsay v. Tansley* (*Sup.*), 18 *N. Y. Supp.* 317. We do not think that this case is analogous or controlling. In that case the summons was properly served, and the mistake was apparent upon its face, and as the court says: "The defect was a mere verbal defect, and might have been obviated at the trial or shown to have been a mistake in fact." And the court holds that the mistake as to the return day was an irregularity, and it was the duty of the defendant to appear before the justice, and there present his objection, and, having failed to

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do so, he could not raise it on appeal; but it will not be contended that if the defendant had appeared in this case there could have been any correction or proceeding taken which would have made the service of this process valid or legal, or which could have given the justice jurisdiction of the person of the defendant, unless he waived his legal rights. Nothing could have been done but a dismissal of the case, and it was the duty of the justice, under the plain and expressed provision of this statute, to have done so. He had in direct violation of the law authorized an improper person to serve this process, and the only thing left for him to do to correct his error was to dismiss the case, and issue a new process and have it served as the law directs. It seems to us that if we should hold that the service of this process was valid we would not only override the express provisions of the statute, but would be establishing a precedent which might open the door for these inferior courts to disregard all of the rules adopted by the legislature for their guidance and the protection of their suitors. If the clear mandate of the law that a party to the action cannot serve his own summons, can be disregarded, then the provisions as to service by an infant and personal service and the sworn return of a constable to the service, or that the justice did not wait one hour before proceeding with the trial, may all be urged as mere irregularities, of which the defendant cannot take advantage on appeal, unless he appears and raises the question before the justice. There is abundant authority that the service and the return of the constable and that the justice must wait one hour, or that the defendant was not a resident of the county or of the town or of an adjoining town, must be made and shown to have been done pursuant to the provisions



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of the statute, and, if they are not, the justice acquires no jurisdiction. *Fitch v. Devlin*, 15 *Barb.* 47; *Wheeler v. Lampman*, 14 *Johns.* 481; *Manning v. Johnson*, 7 *Barb.* 457; *Sherwood v. Railroad Co.*, 15 *Barb.* 650; *Sperry v. Reynolds*, 65 *N. Y.* 179; *Jackson v. Sherwood*, 50 *Barb.* 356; *Brown v. Cady*, 19 *Wend.* 477. In the case of *Larocque v. Harvey*, 57 *Hun*, 366, 10 *N. Y. Supp.* 576, the Court says that "the fact that the defendant did not appear in response to a summons which the justice had no jurisdiction to issue, was no waiver of his right to his subsequent objection to the entry of an unauthorized judgment." When we consider the fact that justices' courts derive all of their powers from the statutes creating them, we cannot bring ourselves to the conclusion that so flagrant a violation of the law regulating their procedure as this case presents should be permitted. Under the circumstances of this case, we have arrived at this determination with considerable regret, but we must apply the law according to our best judgment and understanding, irrespective of its hardships to individuals. The judgment must be reversed.

Judgment reversed.

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Harding v. Elliott.

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HERBERT L. HARDING, *et al.* v. JOHN M.  
ELLIOTT, *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,  
MAY, 1895.

§§ 641, 649, 655.

*Transfer of demand to forestall attachment.*

Where an attachment against property has been vacated and subsequently a second one granted, and between the vacating of the first and the granting of the second, the property has been transferred, such transfer confers a good title in the transferee, free from the attachment.

An executed transfer of property passes the title, even if made with intent to hinder, delay, and defraud creditors; and the transferee has a good title until the same is impeached by a creditor in an action brought for that purpose.

Before there can be a levy of an attachment under subdivision 3 of section 649 of the Code of Civil Procedure upon property which consists of a demand, there must be a demand in favor of the defendant in the attachment suit against a person who is served with a copy of the warrant of attachment; and if before such service the defendant in the attachment suit has transferred the demand existing in favor of a person in this State to another by a transfer valid between the parties, there can be no levy of the attachment, under this section of the Code.

It seems that a creditor's bill can be maintained by the sheriff to set aside a transfer made in fraud of creditors, but to maintain such an action it is necessary to allege and prove the facts necessary to sustain such creditor's action. It must be based upon a judgment against the person making the fraudulent transfer; it must appear that the defendant is insolvent or that the transfer was made in contemplation of insolvency.

A transfer by the defendant of property in this State for the purpose of compelling a creditor not a resident of this State to enforce his claim in California, is not within the statutes preventing an assignment of claims with the intention of hindering, delaying, and defrauding creditors.

(Decided May, 1895.)

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Harding v. Elliott.

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Action to recover certain specific property, which plaintiff alleges is subject to the lien of an attachment served in a previous action.

*Kidder and Melcher*, for plaintiff.

*David Murray*, for defendant Elliott.

*George Q. Collins*, for defendant Kountze.

INGRAHAM, J.—It seems to me that the plaintiff misconceives the scope of this action. The action is not by a judgment creditor to set aside a transfer made by the defendant Severance to the defendant Elliott in fraud of creditors. The plaintiff has no judgment against the defendant Annie C. Severance, nor has the Court any jurisdiction over her, as she has not been served with process within the State. The action is brought under section 655 of the Code, and is to recover certain specified property, which plaintiff alleges is subject to the lien of the attachment served in the action brought by Harding against Mrs. Severance. Mrs. Severance is a resident of California, and the action in which the attachment was issued was commenced by the plaintiff against her, and a warrant of attachment obtained which was served upon the defendant Kountze Bros. The summons in that action was served by publication, the defendant not appearing, and the Court in that action could grant no personal judgment against Mrs. Severance, its jurisdiction being limited to property of Mrs. Severance in this State, upon which a lien had been obtained under the attachment.

The sole question in this case is whether or not, when the second attachment was served upon Kountze Bros., they were indebted to Mrs. Severance in any sum. If they were, plaintiff by the service of the

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Harding v. Elliott.

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attachment obtained a lien upon the amount due Mrs. Severance. If they were not, no lien was obtained upon anything, and the consequence follows that the judgment obtained in that action was without force. The plaintiff obtained the first attachment against Mrs. Severance in the original action, which attachment was served upon Kountze Bros. I assume that at that time Kountze Bros. had property in their hands belonging to Mrs. Severance, and that by that first attachment a lien was obtained upon the debt due from Kountze Bros. to Mrs. Severance. Subsequent to the granting of that attachment Mrs. Severance attempted to transfer the fund in the hands of Kountze Bros. to the defendant Elliott. Both Mrs. Severance and Elliott resided in California; and on July 12th a paper was executed by Mrs. Severance as follows:

"To Kountze Bros., New York.

"Transfer to J. M. Elliott of Los Angeles, California, fifteen thousand (\$15,000) dollars, being the amount on deposit with your bank to the credit of Bank of America of Los Angeles, California, for the use of Mrs. Annie C. Severance.

"The undersigned, Annie C. Severance, hereby assigns and transfers said money for valuable consideration to said J. M. Elliott."

And notice of this instrument was sent to Kountze Bros. in New York, and it was accepted without objection by them. Subsequently, and on the same day, Mrs. Severance executed another paper, dated at Los Angeles, California, directed to Bank of America, as follows:

"Please transfer to J. M. Elliott the sum of fifteen thousand dollars whenever the attachment therein shall have been released, and all interest therein held by me is hereby transferred to the said J. M. Elliott."

This instrument was delivered to the Bank of America and held by it. On July 21st an order was entered vacating the first attachment obtained by the

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plaintiff under which the interest or property of Mrs. Severance in the hands of Kountze Bros., or any indebtedness of Kountze Bros. to her, has been seized. Immediately after the vacating of that attachment, the plaintiff in that action obtained the second attachment, which, on the same day, was served upon the firm of Kountze Bros. In the meantime the instrument before referred to had been executed and delivered, and it is claimed now that at the time the second attachment was obtained and served, Mrs. Severance had no property in the hands of Kountze Bros. ; that Kountze Bros. were not her debtors, but had become the debtors of Elliott, and that plaintiff obtained no lien upon any property by the service of the second attachment.

I do not consider the intent with which this transfer was made to Elliott as at all material. It is well settled that an executed transfer of property passes the title, even if made with intent to hinder, delay and defraud creditors ; and the transferee has a good title until the same is impeached by a creditor in an action brought for that purpose (see *Gibson v. Nat. Park Bank*, 98 N. Y. 97). Thus, on the acceptance of the notice to Kountze Bros. of the assignment from Mrs. Severance to Elliott, and without objection by them, Elliott became their debtor, and it is clear that they were authorized under that transfer to pay the money to Elliott and Mrs. Severance would have had no cause of action against them. That transfer was subject to the lien of the first attachment that had been granted against Mrs. Severance ; and Kountze Bros. were entitled to hold that money to protect themselves as against that attachment, but upon that attachment having been vacated, the right to the possession of the money became vested in Elliott as between himself

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*Harding v. Elliott.*

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and Mrs. Severance and Kountze Bros., and Elliott could have maintained an action against Kountze Bros. to recover it. There can be no doubt of the intention of Mrs. Severance to transfer the money on deposit with Kountze Bros. to Elliott. And even assuming that that transfer was voluntary and without consideration, it was still good as between the parties and divested Mrs. Severance of any title to the money so deposited.

By section 641 of the Code the warrant directs the Sheriff to attach and safely keep so much of the property within his county which the defendant has or which he may have at any time before final judgment in the action as will satisfy the plaintiff's demands.

The Code then provides for the levying of the attachment. And by subdivision 3 of section 649 a levy is to be made upon personal property not capable of manual delivery by leaving a certified copy of the warrant, and a notice showing the property with the person holding the same; or if it consists of a demand, with the person against whom it exists. Before there can be a levy under this subdivision, there must be a demand in favor of the defendant in the attachment suit against a person who is served with a copy of the warrant of attachment; and if before such service the defendant in the attachment suit has transferred the demand existing in favor of a person in this State, to another by a transfer valid between the parties, it seems to me clear that there can be no levy of the attachment under this section of the Code.\* Subdivision

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\* Where a demand due to defendant from a third person has been attached it is the right and the duty of the Sheriff to forthwith bring an action to collect it, without waiting for the determination of the action in which the attachment was issued, or for any order or

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2 of section 655 of the Code, under which this action is brought, provides that the Sheriff is authorized, in aid of such attachment, to maintain an action against the attachment debtor, or any other person or persons, to compel the discovery of any thing in action or other property belonging to the attachment debtor. The section also provides that the Sheriff may maintain any other action against the attachment debtor, and any other person or persons, which may now be maintained by a judgment creditor in a court of equity either before the return of execution in aid thereof, or after the return of an execution unsatisfied. Under this provision, it would appear as if a creditor's bill could be maintained by the Sheriff to set aside a transfer made in fraud of creditors, but to maintain such an action it would be necessary to allege and prove the facts necessary to sustain such creditor's action. It must be based upon a judgment against the person making the fraudulent transfer ; it must appear that the defendant is insolvent, or that the transfer was made in contemplation of insolvency. In this case the plaintiff has no judgment against the defendant and the undisputed evidence is that Mrs. Severance is worth upwards of \$250,000. It is alleged that she transferred this claim with the intention of defeating this plaintiff's right to levy upon this fund upon obtaining a new attachment in this State, so as to compel the plaintiff to enforce his claim in the State of California, where defendant resides ; and I think the evidence would fairly justify a finding that that was the intent with which this transfer was made. But I

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direction from the court or judge. *Davidson v. Chatham Nat. Bk.* 82 *Hun*, 138.

He may incur a serious responsibility if, failing to collect a debt attached, the ability of the debtor to pay is destroyed *ad interim*. *Id.*

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Estate of Sophia Moss.

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know of no authority that holds that an attempt by a person against whom a claim is made to compel the enforcement of that claim in the courts of her own domicile, rather than that of a foreign State, is fraudulent and void. Plaintiff is not a resident of this State and comes here to enforce his claim against a resident of California. The principal question is whether this claim should be enforced in New York or in California, and I do not think that a transfer by this defendant of property in this State for the purpose of compelling a creditor not a resident of this State to enforce his claim in California is within the statutes preventing an assignment of claims with the intention of hindering, delaying and defrauding creditors.

I think, therefore, there should be judgment dismissing the complaint, with costs.

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ESTATE OF SOPHIA MOSS.

SUPREME COURT, SPECIAL TERM CHAMBERS, NEW YORK  
COUNTY, MAY, 1895.

## § 1225.

*Costs to abide the event—what costs are included.*

Where the General Term, on an appeal from the Surrogate, awards costs to the appellant, to abide the event, and the decision is reversed, the respondent should be required to pay the costs of the first trial, the appeal and all subsequent proceedings as the same may be taxed.

Where it is provided that costs shall abide the event, this means all the costs of the action up to and including the decision of the Court of Appeals.

While it may be assumed that when the Appellate Court awards costs, the effect is to include costs of such court only; yet if it assumes to deal with the whole subject and wipes out and re-



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Estate of Sophia Moss.

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verses the judgment or decree appealed from with costs, that includes all the costs of all the inferior courts.

Under section 1225, subdivision 1, of the Code of Civil Procedure, where all of the issues of fact in the action are determined by the findings of the jury, application for judgment may be made at Special Term as upon a motion, and the entry of such judgment should not be stayed by reason of the fact that a motion for a new trial was made on the minutes of the judge who presided at the trial of the issues before the jury.

(Decided May 30, 1895.)

Application for final judgment in accordance with the verdict of a jury admitting a will to probate.

*Weed, Henry & Meyers*, for proponent.

*Abraham Cohen*, for contestant.

LAWRENCE, J.—The facts in this case are these : A decree of the Surrogate of this county was made on the 14th of July, 1892, refusing the probate of the will in question, and imposing the costs of the proceeding upon the proponent. From this decree an appeal was taken to the General Term of this Court. Thereupon the General Term on the first Monday of May, 1894, made an order that the said decree of the said Surrogate, dated the 14th day of July, 1892, declaring said instrument purporting to be the last will and testament of Sophia Moss, deceased, dated the 12th day of February, 1871, null and void, and also rejecting said will and refusing the probate thereof, be and the same hereby is in all respects reversed, with costs to the appellant to abide the event ; also, that “a new trial be had upon the issues herein in the Court of Common Pleas for the City and County of New York, before a jury, on which trial the following issues shall be submitted to the jury for their determination.” (Then follows a statement of the issues.) In accordance with said order a trial was had before one of the

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Estate of Sophia Moss.

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judges of the Court of Common Pleas and a jury. Upon said trial the jury answered all the questions submitted to them in favor of the proponent. No motion for a new trial has been made by the contestant in this court. Application was thereupon made for judgment to the General Term, which decided that the motion should be made at the Special Term of this court, and in accordance with that decision the proponent now applies for final judgment. The entry of such judgment should not be stayed by reason of the fact that a motion for a new trial was made on the minutes of the judge who presided at the trial of the issues before the jury in the Court of Common Pleas (see *Matter of Patterson*, 63 *Hun*, p. 529). I agree with the counsel for the proponent that the application for judgment upon the whole issue, including the question of costs, is therefore properly before the Special Term of this Court, under section 1225, subdivision 1, of the Code of Civil Procedure, and I am also of the opinion that the contention of the proponent, that as the General Term on an appeal from the Surrogate gave costs to the appellant, to abide the event, the contestant should now be required to pay the costs of the first trial, the appeal and all subsequent proceedings as the same may be taxed (see *First National Bank of Meadville v. The Fourth National Bank of New York*, p. 469). As was said by Andrews, J., in that case: "The event of the new trial was the circumstance which was to determine which party should recover costs of the appeal." The order did not limit the recovery of costs to the prevailing party on his appeal, in case he should finally succeed in the action. It was therefore held that the plaintiff, should it finally prevail, was entitled to tax all the costs in the action. Again, in the case of *Franey v. Smith*

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Martin v. Bernheim.

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(126 N. Y. 658), it was held that "Where it is provided that costs shall abide the event, this means all the costs of the action up to and including the decision of the Court of Appeals." And in the matter of Hood (30 Hun, p. 472) the General Term of the Second Department said: "While it may be assumed that when the Appellate Court awards costs the effect is to include costs of such court only; yet if it assumes to deal with the whole subject and wipes out and reverses the judgment or decree appealed from with costs, that includes all the costs of all the inferior courts." In obedience, therefore, to what I understand to be the decision of the General Term in this case and the cases above cited, I have signed the decree which has been submitted on behalf of the proponent.

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MARTIN v. BERNHEIM.

SUPREME COURT, SPECIAL TERM CHAMBERS, NEW YORK  
COUNTY, MAY, 1895.

§ 523.

*Verification of pleading—when it may be omitted.*

Section 523 of the Code of Civil Procedure, providing that where a party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading, the verification may be omitted, applies in the case of an answer to a complaint that defendant made a statement of and concerning the plaintiff in the presence and hearing of reporters, and intending that the said words should be published in the newspapers. If he would be so privileged from testifying as a witness if asked that question under the section of the code above referred to the verification may be omitted.

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The fact that in the same answer he has the right to plead other defenses does not take away from a defendant a right to answer such an allegation as is contained in this complaint without verifying the answer.

(Decided May 27, 1895.)

Motion for leave to serve an unverified answer.

*John J. Adams*, for plaintiff.

*Root & Clarke*, for defendant.

INGRAHAM, J.—It is clear that if the allegations of the complaint are true the defendant is guilty of a misdemeanor under section 254a of the Penal Code, and by section 523 of the Code of Civil Procedure it is provided that where a party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading, the verification may be omitted. The only question to be determined is whether or not the defendant in this case would be privileged from testifying as a witness concerning the allegations of the complaint that the defendant made a statement of and concerning the plaintiff in the presence and hearing of reporters, and intending that the said words should be published in the newspapers. If he would be so privileged from testifying as a witness if asked that question, under the section of the Code above referred to, the verification may be omitted. And yet it is clear that if he made the statement, contained in the complaint, to the reporters, with the intent that the words should be published, he would be guilty of a misdemeanor under the section of the Code of Civil Procedure above referred to. In his answer to a complaint alleging the fact of such a statement he is compelled to either admit that the statement is true, deny the statement

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alleged, or deny knowledge or information sufficient to form a belief.\* Under the express provision of the Code he is allowed to answer such an allegation contained in the complaint by an unverified answer. The fact that in the same answer he has the right to plead other defenses does not take away from a defendant a right to answer such an allegation as is contained in this complaint without verifying the answer. All of the defenses to the action, and all facts pleaded in mitigation of damages, must be set forth in one pleading. In this case the answer does deny the fact that the defendant made the statement it is alleged that he made with the intention of having it inserted in the newspapers. I think on the whole case that the defendant was entitled to serve an unverified answer, and that the motion must be granted.

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\* He may in pleading, deny the allegation and omit the verification. If he declines to answer the allegation at all, it is admitted, like any other unanswered allegation. *Scovill v. New*, 12 *How.* 319. *Moloney v. Dows*, 3 *Hill.* 247.

The provisions allowing an omission of the verification apply only where the accusatory matter is contained in the pleading to be answered. *Fredericks v. Taylor*, 52 *N. Y.* 596.

It is not necessary to verify the answer in an action for libel, even though the complaint be verified. *Wilson v. Bennett*, 2 *Civ. Pro. R.* 84; *Goth v. Star Print. Co.*, 14 *Civ. Pro. R.* 8.

In an action for libel, if the answer denies the publication no verification is required. *Id.*



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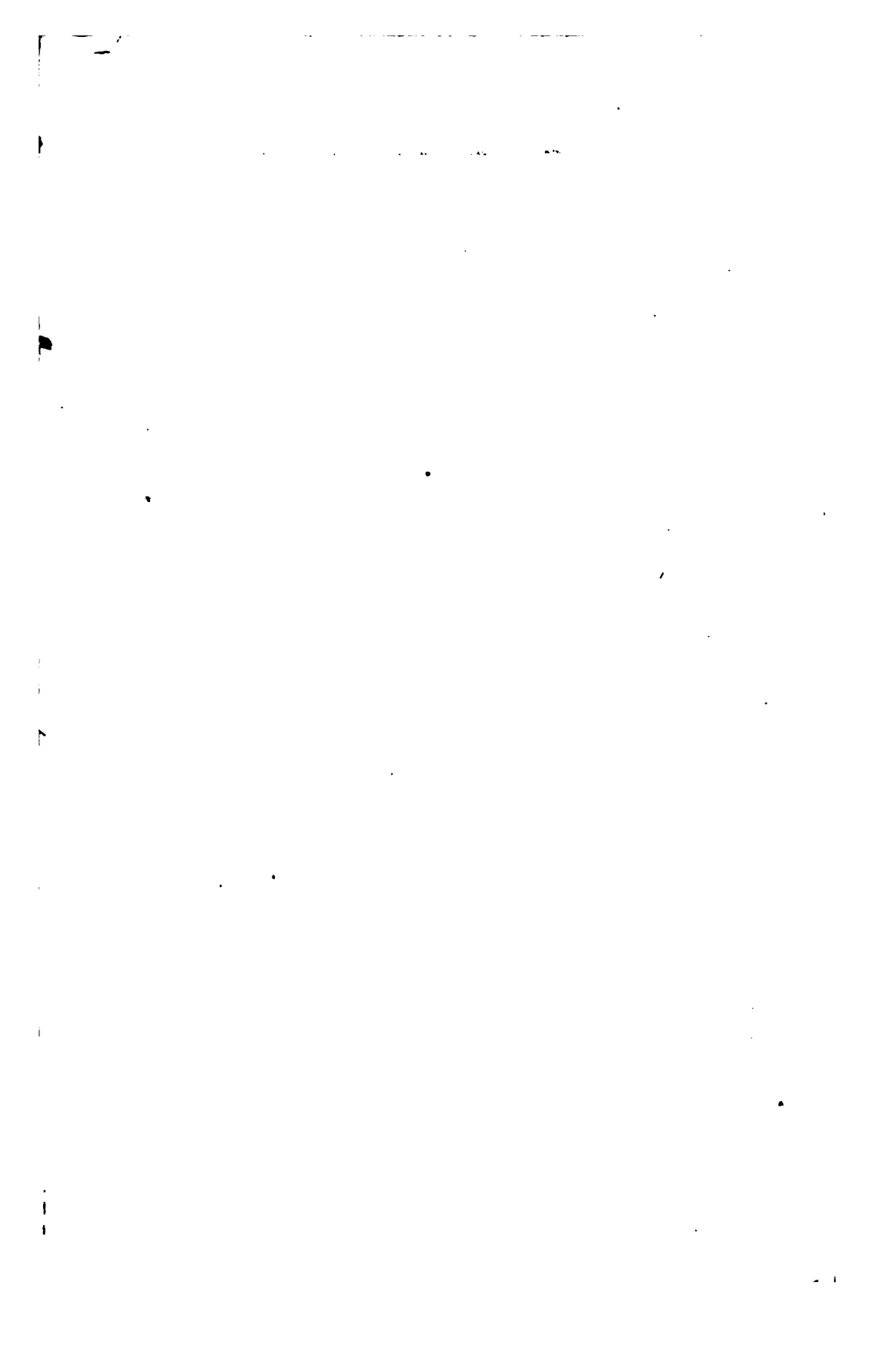
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